No. 16057

United States Court of Appeals

For the Ninth Circuit

MAX T. EDWARDS and GILBERT EDWARDS, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

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INDEX

Page

TABLE OF CASES

(Including citation of disposition before the United States Supreme Court)

TEXTBOOKS

STATUTES

COURT RULES

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BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

The appellants were indicted December 13, 1956, on twenty-one counts of claimed violations under 18 U.S.C. Sec. 152[1] in connection with the bankruptcy of Edwards Shaver Departments, Incorporated (R. 3-14). The number of counts resulted largely from a three-fold statement of offenses connected with six separate transfers of funds from Edwards Shaver Departments, Incorporated, totaling $36,500.00 and the transfer of a cash register and an adding machine. The appellants, by verdict of the jury (R. 29-32) were found not guilty on twelve counts, guilty on eight counts, and appellant Gilbert Edwards was found guilty of one additional count (R. 32). Of the nine counts last referred to charging fraudulent acts, six charged concealment of specific sums transferred from Edwards Shaver Departments, Incorporated; one count charged concealment of a

[1] See Appendix C.

cash register; one count charged the transfer of the same cash register; and the final count charged concealment by Gilbert Edwards only of an adding machine (R. 3-14). Appellants filed motion for judgment of acquittal and alternatively for a new trial (R. 33-37) which motions the trial court denied.[2] Judgment, sentence and commitment were entered by the trial court on the 24th day of March, 1958 (R. 38,42). Appeal from this final judgment to this court is pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3231. Appellants each filed Notice of Appeal on the 27th day of March, 1958 (R. 45-48) pursuant to Federal Rule of Criminal Procedure 37, and have perfected this appeal pursuant to Federal Rule of Criminal Procedure 39 and the rules of this court.[3]

STATEMENT OF THE CASE

A. History of Companies

Max T. Edwards is a Canadian subject, one of four brothers, Bert, Paul, Gilbert, and Max (R. 444, 503). Prior to 1946 and at all times since he was the owner and manager of a retail shaver business in Vancouver, B.C., known as Edwards, Ltd. (R. 444). In 1949, Max and Bert Edwards purchased a Vancouver, B.C., retail cutlery business known as Lewis Cutlery, Ltd., but this joint ownership continued only two or three years (R. 450-451). Lewis Cutlery, Ltd., has continued to be op-

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[2] These motions were denied March 24, 1958, as shown by the docket entries (R. 62). The docket entries, however, are abbreviated and were not printed in full (R. 49) although designated as part of the record on appeal on April 22, 1958. This designation was sent by the District Clerk to the United States Court of Appeals at San Francisco (R. 59-64, Item 37).

[3] The writer of this brief first entered an appearance in this case as counsel of record after appeal taken (R. 58).

erated at all times since by Max T. Edwards (R. 444-445).

In 1946 Max T. Edwards commenced his own retail shaver business in Seattle, Washington, under the name of Edwards Electric Sales & Service Company (R. 340-341). This business was later incorporated July 25, 1946 (Pl. Ex. 5), he becoming the sole stockholder (R. 126). Thereafter, considerable effort was expended by him in building up the business (R. 684). In 1948 the company added a retail store in Portland, Oregon (R. 448). Meanwhile, in 1946 Max T. Edwards organized and owned (R. 126) a California corporation under the name of Edwards Electric, Inc., to operate retail shaver stores in California (R. 448). In the latter part of 1946 this corporation opened a store in Los Angeles and shortly thereafter one in San Francisco (R. 449).

In 1949 the companies began to expand by opening up concessions in department stores (R. 451-453). It was about this time that Gilbert Edwards was employed by the business as sales manager of the concessions at a salary of $350 per month, plus expenses (R. 702). Shortly thereafter the name of the Washington corporation was changed to Edwards Shaver Departments, Incorporated (Pl. Ex. 5). Concessions were opened up in Los Angeles, San Francisco, Portland and Seattle (R. 100, 452-453, 703; Ex. A-5). By the end of 1951 there were concessions in the Broadway Department Stores in Los Angeles, Macy's in San Francisco, Olds & King in Portland, and the Bon Marche in Seattle (R. 100, 452-453). The concession agreements, generally, required stores to be closed as soon as possible (R. 453) but not immediately (R. 453) in order that store cus-

tomers might be saved for the concessions and sent to the department store concessions (R. 453, 720). Accordingly, in time, stores were closed in Los Angeles, San Francisco, and Portland (R. 707, 452). However, the Seattle store was permitted to remain open by the Bon Marche for a time (R. 776-777) and was, in fact, open at the time of the events hereinafter referred to, although in process of being closed (R. 324-325, 329, 334, 529-530).

Sales volume in the department store concessions continued to increase and the store concessions were generally profiitable (R. 278). The stores, however, did not prove to be profitable, but were, in fact, a serious drain because of their losses (R. 278-279). Because, however, the concessions were profitable, expansion of concessions was contemplated. In fact, in 1950 and 1951 Max T. Edwards was studying the matter of opening up new concessions (R. 461-462) pursuant to invitation from Macy's in the various Macy stores throughout the country (R. 454-460). Financial limitations, however, prevented this expansion (R. 705). The matter of shaver concession expansion into Macy Department Stores was again reopened toward the end of 1952 (12-11-52) (R. 464-468, 705) (Exs. A-13 and A-14), but again the program was not completed because of lack of finances. However, in 1952 additional profitable concessions were opened up for the retail sale of foreign-made cutlery in department stores in Los Angeles, San Francisco and Seattle (R. 464).

In addition, consideration was given to expansion eastward (R. 482, 603). In fact, early in 1952 (R. 666) consideration was given to incorporating in anticipa-

tion of expansion in the East (R. 482, 655-656). However, it was not until February 9, 1953, that two additional corporations were organized, Shaveraids, Inc. (Pl. Ex. 26) and Cutlaire, Inc. (Pl. Ex. 25), Nevada corporations, being so organized by Gilbert Edwards in Seattle (R. 558-559, 671) on the advice of legal counsel for the corporation (R. 483, 603, 653-656). It was expected that these corporations would go into eastern department store concessions or the jobbing and wholesaling end of the shaver and cutlery business (R. 655-656), the share interest of the brothers to be later determined (R. 674). This, however, did not materialize because of the events hereinafter related. Max T. Edwards believed the potential or future was good (R. 556) and expansion was planned (R. 511, 512, 514, 692, 759).

B. Financial Condition of Companies and Their Financing

The Washington-California corporations here involved were under-capitalized (R. 322, 715) and, therefore, had to rely heavily on economies, on credit from creditors and on borrowings. The concessions were generally profitable (Pl. Ex. 13, 39; R. 278, 284-288, 313-316, 331, 686-687; Ex. A-5, A-6, A-7, A-8) but the stores were not (R. 449). After 1950 Max T. Edwards, although he devoted substantial time to the business (R. 470), took no salary from the Washington corporation, just reimbursement of expenses (R. 279, 599, 630, 472, 632-633). His income was from his Canadian stores (R. 628). Gilbert Edwards' salary was a modest one of $350 a month and expenses (R. 290, 292, 342-343, 348, 774-775).

The suppliers (long term) (R. 716-717) such as Remington, Schick, Sunbeam, Graybar, General Electric, Marshall-Wells, Hall & Company, Horne & Cox, and others, extended liberal credit (R. 104, 124-125, 475). The largest creditor, Marshall-Wells (R. 106) in 1952 agreed to a long-term repayment arrangement (R. 106, 475, 768; Ex. A-15). Remington, however, stopped giving credit (R. 772). Generally, credit was extended with Christmas dating so that creditors were generally paid shortly after the Christmas season (R. 259-260). The companies were slow pay always (R. 322, 474, 475, 715). They received collection letters from creditors at all times (R. 547, 735), but managed to keep the creditors satisfied (R. 306, 321, 716) until the latter part of February, 1953 (Br. p. 9, *infra*). This situation about slow pay, collection letters, and liberal extension of credit had always been true in 1951 and 1952 (R. 546-547, 734-735), and Max T. Edwards didn't consider these a serious threat (R. 547). Gilbert Edwards didn't consider the companies' situation any different than in 1950, 1951 or 1952 (R. 744). The business was growing (R. 747).

The third and major source of financing was from the proceeds of loans. This helped build volume (R. 716). Bert and Gilbert Edwards lent the companies sums on at least four different occasions, each borrowing the money from other sources on his own collateral in order to provide the funds needed by the Max T. Edwards companies (R. 486-487, 717, 774, 779-780).

The principal source of loans, however, came from Max T. Edwards and his Canadian companies (R. 292, 485, 486-487). He borrowed heavily from Canadian

banks (who were not authorized to lend money to the Washington-California corporations) (R. 673) and Max T. Edwards would then lend the proceeds of these loans to the Washington and California corporations (R. 294, Ex. A-4; R. 485, 715) and was owed substantial sums on that account. Max T. Edwards made no charge to the corporations for the interest (R. 292) which he, in turn, had to pay to the Canadian banks, so in effect, the companies got the benefit of those loans interest-free (R. 292-293). At 6%, this amounted to $1,594.44 in 1952 and $150.16 in 1953 (R. 293). Were it not for the loans made by Max T. Edwards, the companies could not have continued to operate (R. 292, 307).

The loans from the Canadian banks to Max T. Edwards were evidenced by demand notes signed by Max T. Edwards and his wife and by his Canadian companies (R. 484-485, 506, Pl. Ex. 17; Exs. A-4, A-30; R. 623). To obtain these loans, Max T. Edwards had pledged his life insurance and Mr. and Mrs. Max T. Edwards had mortgaged their home and automobiles as security (R. 486-487).

In the latter part of 1952 the Canadian banks called their loans (R. 488, Pl. Ex. 17). They were to be paid about Christmas time (R. 471, 649, 622; Exs. A-17, A-30). The Washington-California corporations at that time were heavily indebted to Max T. Edwards for loans made by him to the corporations from the proceeds of the Canadian bank loans (R. 120-121, 484-486).

The corporations were entitled to various sums payable in January, 1953, on account of the business done by them in the concessions. To obtain funds with which to repay Max T. Edwards so that he in turn could repay

the Canadian bank loans, the corporations obtained advances on account from the department store concessions in various amounts (substantial sums remaining owing, however) (R. 176, 183, 185, 192, 205, 208-209, 226, 414; Pl. Exs. 17, 20, 21), a procedure customary with concessionaires (R. 185), the accounts of the corporations being charged accordingly (R. 192, 292, 296, 299; Ex. A-4; R. 301, 490, 491; Exs. A-17, A-18). The Washington-California corporations then turned these advances over to Max T. Edwards, whose account was charged therewith (R. 120, 121, 122). He, in turn, took the funds so derived and converted them into Canadian funds in order to transmit to Canada to pay Canadian banks (it being cheaper to do so) (R. 718; Pl. Ex. 13, 14) and used them to pay off the Canadian bank loans (Pl. Ex. 31, 32, 33, 28, 29, 30, 34; R. 533-534; Exs. A-17, A-18) in December, 1952, and January, 1953; also to pay life insurance premiums on his life insurance, and to assist his wife in a small way in making an investment in real estate in Vancouver (R. 534, 523; Exs. A-23, A-24). [This real estate did not belong to Max T. Edwards (R. 621) except for a $5,000 equity (R. 621). He executed a $10,000 guaranty in that connection (R. 604, 621; Exs. A-19, A-20, A-21)]. After the completion of this program, Edwards Shaver Departments, Incorporated, was still indebted to Max T. Edwards (R. 614). This would have been even greater if loan interest had been charged or salary charged (R. 292-294). In addition, the Canadian companies, Edwards, Ltd., and Lewis Cutlery, Ltd., had been doing business with the Washington corporation over a period of years on a contra account basis and were owed $5,000

in the case of Edwards, Ltd. (R. 699) (Max T. Edwards estimated) (R. 529) and $2,029.25 in the case of Lewis Cutlery, Ltd., as of January 31, 1953 (R. 528).

The handling of these finances did not involve an interruption in the continuance of the business of the Washington-California corporations. On the contrary, in January and February of 1953, payments were made to various creditors (R. 349, 350; Ex. A-3; R. 347, 348, 735-737), additional merchandise was purchased (R. 738), and Max T. Edwards (who alone handled the finances) (R. 783) continued to lend money to the corporations; *e.g.,* a loan of $2,000 on February 9, 1953 (R. 735, 132), and $1,000 on February 13, 1953 (R. 772). During December, 1952, and January, 1953, no creditor had contacted Max T. Edwards about payment of its account (R. 507, 547).

C. Events Preceding Receivership

However, the financial condition of the companies had worsened in 1952 over what it had been in 1951 (R. 312, 313) even if we exclude from consideration the valuable concession contracts, goodwill and experience (R. 554, 693-694). The Seattle store was losing money and an effort to sell it in September, 1952, had proved fruitless (R. 477-478). Max T. Edwards had instructed Gilbert Edwards to close the Seattle store as soon as possible after the Christmas season (R. 477-478). However, the concessions were operating and were profitable (R. 278, 284-288, 313-316, 331, 686-687). About February 10, 1953, Max T. Edwards and his British Columbia attorney, Mr. Sharp, discussed informally with creditors the matter of the payment of accounts

(R. 680). It was evident that additional time would be needed to meet the claims of creditors and so, on February 17, 1953, a letter formulated by Attorney Sharp was sent out to creditors requesting additional time (R. 632-633, 657-658; Ex. A-33). Before that letter was received by the Hall Company, a representative of that company came to Seattle about February 26, 1953, to discuss the payment of the Hall Company account (R. 631). He was quite cooperative and friendly (R. 660). As a result of this discussion, a meeting of creditors was arranged for February 27, 1953 (R. 508, 509) to discuss the payment of the accounts owing. At this meeting, various suggestions were made as to how creditors should be paid (R. 543, 663). Attorney Sharp suggested making a settlement of 25% on the dollar (R. 539). Mr. Burch suggested that additional advances be obtained from the department stores to pay creditors (R. 243, 244-245). The meeting was friendly (R. 325, 326, 511). No threats of action were made by any creditor (R. 540, 660). No suggestion of bankruptcy was made (R. 511, 734). Indeed, at that meeting, Max T. Edwards, together with Gilbert Edwards, offered to continue without salary so as to permit the full payment of creditors from the proceeds of the business (R. 540-541, 684, 539). There was no suggestion by anyone at or prior to the February 27 meeting that operations be terminated. No threats of legal action were brought to the attention of Attorney Sharp (R. 679, 696) and he had not been consulted by either of the Edwards with reference to the possibility of bankruptcy or of threats of legal action (R. 668, 679, 734). There was some discussion at the February 27 meeting as to whether a creditor known as

Horne & Cox could be persuaded to hold off any action to collect its account (R. 267, 326). The Hall Co. representative thought he could hold Horne & Cox in line (R. 267, 326). At that meeting, Mr. Ester, the company accountant, was asked to prepare a financial statement showing the condition of the business as of the end of 1952 and a second meeting was to be held after that report was prepared.

D. State Court Receivership and Bankruptcy

However, on February 27, 1953, suit was instituted by an assignee of Horne & Cox against the California corporation (Pl. Ex. 22, Ex. A-26) and its property was attached (R. 514, 515; Ex. A-26). Max T. Edwards considered this as a "bolt out of the blue" (R. 517, 544, 548,549, 662). Accordingly, when the second meeting of creditors was held on March 9 (R. 274, 288, 327-328, 329, 334), the creditors' attitude had changed (R. 328); they were concerned and refused to make an arrangement to continue with the operation of the corporation (R. 522, 524, 665) which Max T. Edwards wished to continue (R. 667). The attachment caused the concession agreements in California to be cancelled according to concession contract (R. 518-519, 521; Exs. A-1, A-27). Suit was brought against the Washington corporation and State Court Receiver appointed on March 11, 1953 (R. 98, 168, 249, 351). He took possession of the corporate books and records of Washington and California corporations (R. 298, 613, 731; Pl. Ex. 24). An involuntary Petition in Bankruptcy was filed against the Washington corporation on May 7, 1953 (R. 168), and the corporation was adjudicated bankrupt May 25, 1953

(R. 168). Meanwhile, involuntary bankruptcy proceedings against the California corporation (R. 273, 168) (Receiver appointed March 27, 1953) (R. 98), were dismissed on condition that the assets of the California corporation be administered as part of the bankrupt estate in Seattle, Washington. This was done (R. 98, 168-169).

Subsequently, the Receiver of the Washington corporation sold the assets in the Bon Marche concession at sale (R. 587) and the assets were purchased by Shaveraids, Inc. (although the corporation had not been designed for that purpose) (R. 688) for reasons of economy, the corporation being organized and available (R. 688). Shaveraids, Inc., attempted to purchase concession assets in California, but without success (R. 588). The funds that would have made such purchase possible were to have come from the proceeds of a loan that Bert Edwards made or was prepared to make (R. 650-651). Max T. Edwards was not a stockholder in Shaveraids, Inc., or financially interested in the Seattle concession (R. 170-171).

E. Cooperation Subsequent to Appointment of Receiver

Following the appointment of the Receiver, Gilbert Edwards cooperated fully (R. 374). There was no claim by the government that there had been any concealment at any time from the Receiver by either Gilbert or Max T. Edwards (R. 169). The Receiver received information about the affairs of the corporation from Max T. Edwards (R. 351). Gilbert Edwards was examined before the Referee by the Trustee in Bankruptcy and by his attorney, and answered all questions put to him

concerning the affairs and property of the company (R. 732). At no time did either the Receiver or the Trustee in Bankruptcy contact Max T. Edwards or make any request or demands upon him (R. 552-553, 605, 619-620). Later (April, 1954) (R. 619), a suit was instituted against Max T. Edwards and others in Vancouver, B.C., and that suit was settled by the payment of $10,000 to the Trustee (R. 616-618; Ex. A-29, 10-22-56). A release was executed (Ex. A-29). Subsequent to the settlement, warrants for the arrest of the defendants were issued (R. 16-17).

F. Financial Records of Bankrupt Corporation

A principal witness for the government was Edward R. Ester, certified public accountant, an accountant for the Washington and California corporations involved since 1946 (R. 284). It was Mr. Ester who not only supervised the keeping of the books and records for the corporations involved and supplied data for creditors but who was also employed by the Receiver and later by the Trustee in Bankruptcy. The government also used as a witness and relied upon the testimony of Bernice E. Flynn. Bernice E. Flynn commenced employment for the Washington corporation in August, 1952 (R. 429, 421) and continued in the employment for a period of two weeks following the appointment of the Receiver (R. 425). Miss Flynn kept the bookkeeping records (R. 420, 424, 426-427). She testified that nothing happened to the records of the Washington corporation while she was there and there was no change in the manner of keeping these records (R. 426-428).

Corporate books of account including records of original entry were kept at all times (R. 277, 147, 427, 140), as well as daily sales reports (Pl. Ex. 47). However, transactions between the Washington and Canadian corporations were always recorded in books kept in Vancouver (R. 433-434), not in Washington (R. 281). It was Mr. Ester's practice to make adjusting entries at the end of the year (R. 282), the last such entry made being in 1951 (R. 282). He hadn't made them for 1952 because, as he testified, this was not due to any request or intervention on the part of the Edwards, but rather because he, the accountant, hadn't gotten around to it (R. 282).

Likewise, the postings from the books of original entry had not been made since June, 1952, for the same reason (R. 282). However, the books of original entry did contain the record concerning the state of Max T. Edwards' account with the corporation (R. 155). This account showed advances made by Max T. Edwards to the corporation and the repayment of such advances (R. 155). Also shown were the loan of Gilbert Edwards of $1,800 to the Washington corporation on August 5, 1952 (R. 307, 308, 347, 348) and the $2,000 paid to Gilbert Edwards (R. 170-172; Pl. Ex. 12, 35).

The same records showed the state of business of the concessions (R. 315-316) and the department store advances (Pl. Ex. 17—Macy's $5,000; Pl. Ex. 20—Weinstock-Lubin, $5,000; Pl. Ex. 21—Broadway Department Store, $15,000) (Pl. Ex. 21).

Among the records of the corporation turned over to the State Court Receiver were the following:

(a) Checks involved in the withdrawals by Max T.

Edwards (Pl. Ex. 8, 9, 10, 13, 14); (b) Books of original entry showing the state of Max T. Edwards' account, with withdrawals being charged to him (R. 155); (c) Accounts payable ledger (Pl. Ex. 2); (d) Accounts payable statement (Pl. Ex. 1) showing the status of accounts payable on various dates; (e) The statement of the condition of the business exhibited to creditors at the February 27, 1953, meeting (Pl. Ex. 3) (R. 322, 334) (Mr. Cosby, later State Court Receiver, was present, R. 323); (f) Ex. A-8 made at the creditors' request and submitted at the March 9th meeting (R. 325-327); (g) Ex. A-3 (St. 1-31-53) submitted to creditors at February 27, 1953, meeting (R. 323-324); (h) Check showing the ownership of the cash register by the Washington corporation (Pl. Ex. 6); (i) Records of departmental business (R. 314-315); (j) Record of Gilbert Edwards' loan of $1,800 (R. 347-348); (k) Ledger sheets (Pl. Ex. 39); and (l) Daily sales reports for 1952 (Pl. Ex. 47).

The Receiver testified that he was able to ascertain the status of the business as of 12-31-52 (R. 302-303). On that basis he knew, or could have ascertained, that at the end of 1952 after the advances and withdrawals were balanced, the Washington corporation was indebted to Max T. Edwards in the sum of $2,756.38 (R. 121, 298). It was also possible to ascertain from those records that the company was indebted to Max T. Edwards on January 12, 1953, in the sum of $2,000, $300 on January 15, 1953, and $3,000 on January 21, 1953, subject to amounts owing by him for an unpaid stock subscription and a Cadillac car. The amount owed by him would have been $2,543.62, and this, Max T. Edwards repaid the corporation (R. 122).

It is true that there was no book record showing the transfer of the cash register and the delivery of the adding machine. This, however, was too soon before the onslaught of the receivership. However, these matters could have been inquired into by the Receiver and the Trustee. Mr. Ester testified that Max T. Edwards gave the Receiver information relative to corporate affairs (R. 351), and that the Receiver explained the books and records to the Trustee in Bankruptcy (R. 355).

There was no showing that the records were incorrect or otherwise incomplete, but merely that Mr. Ester had not gotten around to posting the transactions to the ledger from the books of original entry (R. 282). He also was employed by the Receiver to make postings to the ledger and there was no showing that he failed to do so. There was no showing that either of the defendants had not truthfully answered all questions, or that they had refused to answer creditors, or that the creditors were not fully aware of all facts connected with any of the items which are the subject of the various counts of the Indictment.

G. The Transfer of the Cash Register and the Delivery of the Adding Machine

The Washington corporation owned a cash register (R. 127-128; Pl. Ex. 6, 27; R. 380-381, 421). About February 17, 1953, in connection with the previously authorized (R. 477-478) closing or dismantling (R. 727, 760) operations [because the Seattle store, being unprofitable (R. 286-287, 338) was to be closed (R. 324, 329, 334, 477-478, 529-530) and its business was tapering down (R. 609)], Gilbert Edwards arranged to ship

the cash register and other items to Edwards, Ltd. (R. 757-758). Accordingly, an invoice showing this transaction was made out February 20, 1953 (R. 764). This invoice was a preliminary requirement of the shipment (R. 230). The cash register and other items were originally released by the Customs Service on March 2 or 3, 1953, and then returned for some reason (R. 229) and then again released to Bekins Transfer (R. 228) about March 9, 1953 (R. 229). Thus, the cash register was gone before the State Court Receiver was appointed, a rented one being substituted (R. 422). The transfer of the cash register was for the sum of $126 charged to Edwards, Ltd. (R. 726, 766). Reference to Ex. A-34 shows notation that the amount was taken off the account between two stores and paid (R. 722, 726).

The cash register was ultimately delivered to the Lewis Cutlery, Ltd. store in Vancouver, B.C. (R. 765, 529-530). That company needed the cash register (R. 530) to replace an older unsatisfactory type (R. 728); in fact, it could have used it sooner (R. 763) and Gilbert Edwards was late in sending it up (R. 763). He had been instructed to close the Seattle store as soon as possible after the Christmas business (R. 477-478). About the same time, as part of the dismantling operations, other items were shipped to California (R. 760-762). The adding machine, owned by the corporation (R. 127), which was a portable machine, inadvertantly referred to as a cash register, was delivered by Gilbert Edwards [who used it at the store (R. 531) and at his home, too (R. 729-730)] to Max T. Edwards (R. 758, 531, 533) for his use in his travels for the business (R. 533, 630-631) in January or February 1953 (R. 530-531) prior to the appoint-

ment of the State Court Receiver. Accordingly, it never came into the Receiver's possession (R. 422) and never came into the possession of the Trustee who was appointed after the filing of the involuntary petition on May 7, 1953. Miss Flynn testified (contrary to another government witness, R. 356) that no adding machine was replaced in the Seattle store, apparently because not needed (R. 423, 608). No demand for possession of said items was ever made by the Trustee or Receiver (R. 605).

H. Elements of Offenses Charged But Not Proved

These will be referred to in Argument. We would like to point out, however, that we have not found in the Record any reference to the date upon which the Trustee in Bankruptcy was appointed and qualified. May 7, 1953, is the date upon which the petition in involuntary bankruptcy was filed.

SPECIFICATION OF ERRORS

Specification of Error No. 1

The District Court prejudicially erred in overruling appellants' respective motions for dismissal and judgment of acquittal of each and every count respectively of the Indictment against each defendant, the evidence being insufficient as a matter of law to support the allegations of the respective counts. With respect to the defendant, Max T. Edwards, the venue laid was not proved. The judgment should be reversed with directions to enter judgment of acquittal.

Specification of Error No. 2

The District Court prejudicially erred in denying ap-

pellants' respective Motions for Judgment of Acquittal filed March 19, 1958 (pursuant to Rule 29 of the Federal Rules of Criminal Procedure) with respect to the counts and each of them as to which the respective defendants were found guilty. The judgment should be reversed with directions to enter judgment of acquittal.

Specification of Error No. 3

The District Court prejudicially erred in entering judgment of guilty against appellants, and each of them, and in imposing a sentence on the counts as to which there was no evidence sufficient to go to the jury. The judgment should be reversed with directions to enter judgment of acquittal.

Specification of Error No. 4

The District Court prejudicially erred in submitting to the jury counts of the Indictment on which the evidence was not sufficient, assuming *arguendo* that the evidence was sufficient as to other count or counts of such Indictment. The judgment should be reversed and a new trial ordered.

Specification of Error No. 5

The District Court prejudicially erred in overruling objections interposed on behalf of the appellants and each of them to evidence adduced on behalf of the government in admitting plaintiff's Ex. 24 (R. 353).

Specification of Error No. 6

The District Court prejudicially erred in overruling objections interposed on behalf of the appellants and each of them to evidence adduced on behalf of the government in admitting plaintiff's Ex. 12 (R. 149).

Specification of Error No. 7

The District Court prejudicially erred in overruling objections interposed on behalf of the appellants and each of them to evidence adduced on behalf of the government in permitting the government's witness, Benjamin Kendall Cosby, State Court Receiver, to testify concerning the sale of assets of Edwards Shaver Departments, Incorporated (the bankrupt corporation) to Shaveraids, Inc., owned by Gilbert Edwards. The proceedings were as follows:

> "Q. Mr. Cosby, did you as receiver sell any of the assets of the insolvent corporation?
>
> A. Yes, sir.
>
> Q. More specifically did you sell the —." (R. 361)
>
> MR. MORRISON: It is my anticipation, Your Honor, that he will inquire as to the fact of the purchase of some of the assets from the bankruptcy— * * * purchase of some of the assets from the state receiver by Mr. Gilbert Edwards through the corporation Shaveraids, Inc.
>
> * * *
>
> It is my point that this was entirely a solicited bid by the receiver who inquired around from various other sources as to where he could best dispose of the merchandise and that it was in all respects an entirely legal and bona fide action, picking up the pieces that resulted from this bankruptcy.
>
> On that basis I think it's not material, it having occurred substantially after the event, and it may have a prejudicial effect outweighing any probative value it has in view of the nature of the transaction. I anticipate that that is what he's attempting to develop, and on that ground I object." (R. 363)
>
> * * *

Government counsel then stated what he proposed to show. * * *

"THE COURT: The Court thinks upon your bringing that evidence before the Court during the trial that the objections thereupon would be not well taken * * * ". (R. 366)

* * *

Mr. Cosby was then permitted to testify as to the public sale of assets of the bankrupt corporation consisting of the downtown Seattle Bon Marche concession to Shaveraids, Inc., and as to the sale being negotiated by Gilbert Edwards on behalf of the purchaser (R. 368-371).

Specification of Error No. 8

The District Court prejudicially erred in overruling objections interposed on behalf of the appellants and each of them to evidence introduced on behalf of the government, in permitting government witnesses to testify concerning the amount received by general creditors, percentagewise, from either the State Court Receiver or the Federal Court Trustee in Bankruptcy, or both of them. The proceedings were as follows (R. 249-250):

The witness, Clifton Burch, testified as follows:

"Q. Do you know how much the general creditors received percentagewise from either the state court receiver, the Federal Court trustee in bankruptcy, or both of them?

MR. MORRISON: Your Honor, the only purpose of this is apparently to incite some feeling against these defendants and we're not responsible for the method of administration of the bankruptcy proceedings, and I think it has no materiality whatsoever on any issue in this case, and I don't think that

going into the bankruptcy proceedings or what the creditors might have gotten as a result of whatever administration expenses and fees were involved in the bankruptcy proceeding has anything to do with these people, certainly not an intent that was supposed to have been conceived quite a few months before, or years, as it turned out.

THE COURT: The objection is overruled. You may answer.

A. We received approximately — well, we received $6,700 out of a $40,000 claim."

* * *

The witness Edward R. Ester testified as follows (R. 99-100):

"Q. How much did you have as a claim against the bankrupt estate?

MR. MORRISON: Objection, Your Honor. I don't know that that is material.

THE COURT: The objection is overruled.

A. It was roughly eleven hundred dollars. I don't have the exact figure.

Q. (By MR. MCKINNON) How much was paid to general creditors percentagewise, to the best of your recollection?

MR. MORRISON: Now I object to that, Your Honor, as being completely irrelevant and immaterial to any issue in this case as to how the bankruptcy proceeding was administered.

THE COURT: What is the purpose of it, to evidence what issue?

MR. MCKINNON: The intent of the defendants in making the transfers alleged.

* * *

THE COURT: For that limited purpose the objection is overruled, and the—

* * *

THE COURT: The objection is overruled and the witness may answer.

A. It was less than twenty per cent. I don't have the exact percentage. I believe it was around eighteen." (R. 99-100)

Specification of Error No. 9

The District Court prejudicially erred in sustaining the government's objections to admission of Deft. Ex. A-22 (R. 501). The proceedings were as follows:

Beginning at R. 495 the witness testified to accounting data, referring to a schedule which upon request of government counsel was marked for identification as Ex. A-22 (R. 496).

The following proceedings then occurred (R. 500-502):

"THE COURT: Are you reading from this schedule, A-22?

* * *

MR. MORRISON: * * * He is testifying from records which are in evidence. He is referring to the schedule merely to facilitate the testimony where we have made the reference [484] available.

MR. MCKINNON: I certainly object to the admission of any such schedule as this, Your Honor.

THE COURT: The objection is sustained and I think you better not use that for the purpose mentioned.

* * *

MR. MORRISON: If the Court please, we believe it is admissible on two grounds, the preparation of schedules to show transactions and disbursements in a case of this kind has been approved by the courts, and secondly to expedite this proceeding and assist the witness in accurately stating the tracing

of funds involved in this indictment a schedule is almost essential and that's why it was prepared.

THE COURT: Summaries by accountants or by parties who are witnesses are not as a matter of right admissible. There is no evidence as to when this document came into being, whether it was made along with the transactions in order to keep track of the transactions at the time or when it was made, or whether it was one purely made in contemplation of this trial for the [485] witness' convenience or whether it was something made at the time of the business transactions reflected by it.

MR. MORRISON: I will state it was made in preparation for this trial for the witness' and the jury's convenience to show the distribution directly based on evidence which has been submitted of the funds involved in this indictment.

THE COURT: The court has no right, I do not believe, to admit it over objection.

MR. MORRISON: I can submit authority to the court where the admission of such exhibits has been approved.

THE COURT: The Court sustains the objection. You may proceed.

(Defendants' Exhibit No. A-22 for identification was refused.)

* * *

THE COURT: I do not hear a stipulation. You may proceed. The court does not admit it."

Specification of Error No. 10

The District Court prejudicially erred in denying appellants' respective motions for new trial filed March 19, 1958, pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure, such denial constituting an abuse of discretion.

SUMMARY OF ARGUMENT

1. Each appellant is entitled to separate consideration on each count of the indictment of which complaint is here made.

2. In connection with Specifications of Error 1, 2 and 3, there was a failure to prove one or more of the essential elements of the offenses charged as to each count on which the defendants were found guilty, thus requiring the reversal of the judgment of conviction with directions to enter a judgment of acquittal. In connection with this point, the government failed to prove that the defendants or either of them had possession or control of the items of money or property described in the various counts of the indictment at the time of the appointment of the Trustee; failed to prove that there was a knowing and fraudulent withholding of information from the Trustee or creditors concerning the items of money or property involved; with respect to count XIX involving the transfer of a cash register, the government also failed to prove that the transfer was "in contemplation of a bankruptcy proceeding" and "with intent to defeat the bankruptcy law"; that with respect to Max T. Edwards, the evidence was also insufficient in failing to prove that the offenses charged took place in Seattle, Washington (See also Br. p. 57, 60, *infra*).

3. The District Court prejudicially erred (Spec. Err. 4) in submitting to the jury counts of the indictment on which the evidence was not sufficient, assuming *arguendo* that the evidence was sufficient as to other count or counts of the indictment. By this submission, the jury was adversely affected in its consideration of the counts involved. Had counts as to which the evidence was in-

sufficient been dismissed, much evidence would have been withdrawn from the jury's consideration, the issues would have been simplified, and the jury could have considered the remaining count or counts without the prejudice attendant upon the admission of immaterial evidence under simplified instructions of the court. Accordingly, the judgment should be reversed and a new trial ordered.

4. The District Court prejudicially erred in overruling objections interposed on behalf of the appellants and each of them to evidence adduced on behalf of the government with respect to (a) (Spec. Err. 5) in admitting Plaintiff's Exhibit 24 (Br. p. 65, *infra*); (2) (Spec. Err. 6) in admitting Plaintiff's Exhibit 12 (Br. p. 66, *infra*); (c) (Spec. Err. 7) in permitting a government witness to testify concerning the sale of bankrupt assets to Shaveraids, Inc. (Br. p. 68, *infra*); and (d) (Spec. Err. 8) in permitting government witnesses to testify to the percentage received by creditors (Br. p. 69, *infra*). The evidence was immaterial and prejudicial.

5. The District Court prejudicially erred (Spec. Err. 9) in sustaining the government's objections to the admission of Defendants' Exhibit A-22 constituting a summary of accounting testimony (See Br. p. 70, *infra*). The evidence was highly material.

6. The District Court prejudicially erred (Spec. Err. 10) in denying appellant's respective motions for a new trial. The jury had an involved case to consider under a twenty-one count indictment under inadequate instructions, the inadequacy being as to vital matters. As a result, the jury apparently did not properly understand

the case. The denial of a new trial was therefore an abuse of discretion (See Br. p. 72, *infra*).

The foregoing points are set forth under appropriate headings in the index, to which the court is respectfully referred.

ARGUMENT

Specifications of Error Nos. 1, 2, 3, and 10

I.

There Was a Failure to Prove One or More of the Essential Elements of the Offenses Charged as to Each Count on Which the Defendants Were Found Guilty. Judgment of Conviction Should Be Reversed with Directions to Enter a Judgment of Acquittal.

A. Statement of proceedings below on error claimed

Appellants challenged the sufficiency of the evidence at the close of the government's case (R. 437-440) and renewed the challenge at the end of the entire case (R. 783). In conformity with Rule 29, F.R.C.P., appellants interposed a Motion for Judgment of Acquittal (R. 33, 35). Each of these the District Court overruled (See Br. p. 2, ft. 2). The action of the District Court is assigned as error.

B. Preliminary principles

At the outset we deem it helpful to call attention to the following preliminary principles:

1. The error assigned is reviewable. *Lelles v. U. S.* (9 Cir.) 241 F.2d 21; *Anderson v. U.S.* (9 Cir.) 253 F.2d 419.

2. Every element of the offense charged must be proved, else the defendant is entitled to be acquitted.

Politano v. U. S. (10 Cir.) 220 F.2d 217.

3. Each defendant is entitled to separate consideration on each count.

Kotteakos v. U. S., 328 U.S. 750, 90 L.ed. 1557, 66 S.Ct. 1239.

4. Scintilla evidence is not enough. Substantial evidence of guilt is required.

Curley v. U. S. (D.C. Cir.) 160 F.2d 229;

U. S. v. Yeoman-Henderson, Inc. (7 Cir.) 193 F.2d 867, 869.

5. In determining the sufficiency of circumstantial evidence, acquittal must be ordered if the jury must find as reasonable men that the evidence is insufficient. Thus, if the jury must have a reasonable doubt of guilt, the court should grant the motion for acquittal.

Karn v. U. S. (9 Cir.) 158 F.2d 568;

Curley v. U. S. (D.C. Cir.) 160 F.2d 229;

Elwert v. U. S. (9 Cir.) 231 F.2d 928, p. 933.

6. The entire record is considered.

T'Kach v. U. S. (5 Cir.) 242 F.2d 937.

7. Defendants' evidence may be considered in determining whether the government's circumstantial evidence is consistent with the defendants' innocence. In *U. S. v. Gasomiser* (D. Del.) 7 F.R.D. 712, the court said at p. 721:

> "It should be made clear, however, that while all the government's evidence is accepted as true, the court may very well look to the defense evidence for the purpose of ascertaining a reasonable hypothesis other than guilt. In many cases, a motion for judgment of acquittal made at the close of the government's case will be denied because there is no apparent reasonable hypothesis from the circumstances other than that of guilt. Indeed,

> in most cases any hypothesis other than guilt can only be shown in defense. The government usually is interested solely in presenting its own case, and inferences other than guilt can only be shown by facts at variance with the hypothesis of the government itself. If the rule that 'unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused' has merit, then the rule must be invoked at a time where it may have value. After the defense evidence has been presented, therefore, such a motion may be granted for the reason that the defense evidence has presented a reasonable hypothesis other than guilt which may be inferred from all of the government's evidence."

Accordingly, defendants' evidence will be relied upon—not to enable the court to weigh conflicting evidence—but rather to show that the government's circumstantial evidence relied on to show the elements of "knowing and fraudulent," "contemplation of bankruptcy," and "intent to defeat the bankruptcy laws" did *not* negative the innocent character of such circumstantial evidence because of the possible and probable character of such innocence as shown by the defendants' evidence as to what actually transpired. Such a showing will be made to support the defendants' contention that the government failed to establish evidence of guilt, and judgment of acquittal should now be ordered.

> *State v. Buckingham,* ..... Del. ....., 134 A.2d 568.

8. Any error affecting substantial rights is not to be disregarded unless it affirmatively appears from the entire record that it was not prejudicial.

McCandless v. U. S., 298 U.S. 342, 80 L.ed. 1205, 56 S.Ct. 764;

Kotteakos v. U. S., 328 U.S. 750, 90 L.ed. 1557, 66 S.Ct. 1239.

9. Erroneously admitted or excluded evidence which might have operated to the substantial injury of the defendant constitutes reversible error. *Wolcher v. U. S.* (9 Cir.) 200 F.2d 493. This is true even though the evidence is immaterial, if it was otherwise detrimental or prejudicial. *Beyer v. U. S.* (3 Cir.) 282 Fed. 225. This is especially true in a close case. *Templeton v. U. S.* (6 Cir.) 151 F.2d 706.

10. Cases involving concealment under 11 U.S.C.A. §32(c) dealing with grounds for objecting to discharges in bankruptcy, although involving civil rather than criminal liability, will be cited to cast light on the meaning of the phrase in the penal statute, 18 U.S.C.A. §152 "knowingly and fraudulently conceals." Because we have a penal statute here, the rule of strict construction applies (*Field v. U. S.* (8 Cir.) 137 Fed. 6) and it will be recalled that the requirement with respect to this penal statute is that proof of violation must be beyond a reasonable doubt.

C. There was a failure to prove that defendants, or either of them, had possession or control of the items of money or property described in the various counts of the Indictment at the time of the filing of the involuntary petition in bankruptcy, or at the time of the appointment of the Trustee, or thereafter.

1. ***Facts as to the so-called "concealment" counts, namely, Counts III, VI, IX, XII, XV, XVIII, XX and XXI.***

The circumstances surrounding the counts involved

were quite similar. Count III is typical. It charged that the defendants knowingly and fraudulently concealed on and after May 7, 1953, at Seattle from the Trustee and from creditors in a bankruptcy proceeding, property belonging to the estate of the bankrupt, to-wit, $4,000. The following is a summary of the amounts and exhibits and dates involved:

Count III, $4,000 (Ex. 8) dated 12-15-52 (R. 138).

Count VI, $15,000 (Ex. 9) dated 12-30-52 (R. 139-140).

Count IX, $5,000 (Ex. 10) dated 12-30-52 (R. 142).

Count XII, $7,500 (Exs. 30 and 34) dated 12-30-52 (R. 152).

Count XV, $2,000 (Ex. 14) dated 1-12-53 (R. 151).

Count XVIII, $3,000 (Ex. 13) dated 1-22-53 (R. 150).

Count XX, cash register (About February 17, 1953. See Br. p. 16, *supra*).

Count XXI, involving Gilbert Edwards only, adding machine (In February, 1953. See Br. p. 45, 61 *infra*).

The evidence concerning the circumstances under which the sums were withdrawn is summarized at Brief, page 7, *supra.*

One element was common to each of these counts. The government failed to prove that the items involved were in the possession of the defendants at the time of the filing of the involuntary petition in bankruptcy, May 7, 1953, *or at the time of the appointment and qualification of the Trustee in Bankruptcy there being no evidence as to when this took place,* or thereafter. Indeed, the evidence affirmatively showed that the moneys, which are the subject matter of Counts III,

VI, IX, XII, XV, and XVIII, had been disbursed by Edwards Shaver Departments, Inc., on or about the dates above described (the last disbursement being January 22, 1953) in payment of sums owing to Max T. Edwards, his account being charged therewith (R. 41, 42). He, in turn, used the sums to repay loans made by him from Canadian Banks who had called the loans, to pay insurance premiums and to assist his wife in connection with a real estate investment (Br. p. 8, *supra*). The evidence also showed that even after the payment of these funds the company was still indebted to Max T. Edwards (R. 614). The evidence further showed that Max T. Edwards continued to lend money to the corporation as late as February 13, 1953 (R. 772), and the government's evidence showed that any sums paid out to him in excess of his indebtedness were repaid (R. 122, 298-299). Clearly then, as to the sums of money involved, there could be no concealment or secreting. They merely constituted the repayment of a debt owing to a creditor. (The jury found neither conspiracy nor fraudulent transfer involved in these payments because they found the defendants not guilty on the counts which so charged; namely, Counts I, II, IV, V, VIII, X, XI, XIII, XIV, XVI and XVII).

It was, therefore, evident that the moneys so paid to Max T. Edwards had ceased being the property of the corporation from the time of payment and could not possibly, therefore, constitute property of the corporation concealed from the Trustee or the creditors.

2. *The facts as to Count XX with respect to possession or control of the cash register.*

The cash register, which Count XX charged the defendants with concealing as "property belonging to

the estate of * * * Edwards Shaver Departments, Incorporated'' was likewise no longer in the custody or legal control of either defendant. The evidence heretofore reviewed (Br. p. 16-18, *supra*) showed that the cash register was shipped to Edwards, Ltd., Vancouver, B. C., about February 20, 1953 (R. 765-766, 232-233). This was prior to the appointment of the State Court Receiver on March 11, 1953 (R. 422). The transfer was pursuant to an earlier plan to close the Seattle store and Gilbert Edwards was late in getting around to the transfer (R. 761, 765). Edwards, Ltd., was charged $126 for this transfer (R. 726, 766, 772; Ex. A-34). This meant that title to the cash register had passed to Edwards, Ltd., on or shortly after February 20, 1953, and prior to the appointment of the State Court Receiver. It could not, therefore, possibly be property of the bankrupt corporation on May 7, 1953, or thereafter, because title had passed on or about February 20, 1953.

This case, therefore, is not one in which either the bankrupt corporation or the defendants, or either of them, retain a secret interest in the property so that in truth and in fact the property belongs to the estate of the bankrupt, and, therefore, the concealment of the estate's interest violates the statute.

In re Perkins (D.N.J.) 40 F.Supp. 114;
In re Neiderheiser (8 Cir.) 45 F.2d 489.

This is all the more true in the absence of a showing that the creditors or Trustee in Bankruptcy were ignorant of the facts (See Br. p. 12-16, *supra*). This principle that there is no concealment has been applied where the bankrupt has made full disclosure of the facts.

In re Doody (7 Cir.) 92 F.2d 653;
In re Hennebry (N.D. Iowa) 207 Fed. 882.

Certainly, if the defendants in good faith transferred the cash register believing that title thereto was transferred to Edwards, Ltd., such a transfer could not be the subject of "fraudulent concealment."

In re Wakefield (N.D. N.Y.) 207 Fed. 180.

It is true that Max T. Edwards testified that he still had the cash register on May 7, 1953, and that he would have given it to Gilbert Edwards if the latter had asked for it on or after May 7, 1953 (R. 533). Gilbert Edwards also testified the cash register was available in Vancouver, B. C., on May 7, 1953 (R. 741).[4] However, what Max T. Edwards meant is obvious. The record shows that since about February 20, 1953, Edwards, Ltd., the Canadian corporation, was the owner of the cash register, its account having been charged therefor and to whom possession had been delivered (Br. p. 16, *supra*). As the testimony shows, Max T. Edwards did not mean to repudiate the legal custody, possession and control of the cash register by its owner, Edwards, Ltd., the Canadian corporation. All that Max T. Edwards obviously meant was that he had the control of the cash register *on behalf of Edwards, Ltd.,* not a control either on his own behalf individually or on behalf of Edwards Shaver Departments, Inc. Nothing in Gilbert Edwards' testimony is to the contrary.

Edwards, Ltd., a Canadian corporation, was a legal entity, separate from Max T. Edwards, its sole stock-

[4]There was no such testimony as to the time of the appointment and qualification of the Trustee there being no evidence as to when the Trustee was appointed and qualified. May 7, 1953, is the date of the filing of the involuntary petition (R. 168).

holder, and likewise separate from Edwards Shaver Departments, Incorporated, the bankrupt corporation involved. The separate entity of the Canadian corporation cannot be disregarded.

In re Fox West Coast Theatres (9 Cir.) 88 F.2d 212, p. 227;

Burnet v. Commonwealth Improvement Co., 287 U.S. 415, 77 L.ed. 399, 53 S.Ct. 198, 199.

Accordingly, Edwards, Ltd., had life, property, creditors, title, and possessory rights and remedies of its own.

See

Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich, 153 Mass. 42, 26 N.E. 239, 240.

The title, possession or control of Edwards, Ltd., was not that of Max T. Edwards, but was independent thereof. Corporate rights are not stockholder rights. Such rights cannot be ignored even in bankruptcy proceedings. See

Wheeler v. Smith (9 Cir.) 30 F.2d 59;

Finn v. George T. Mickle Lumber Co. (9 Cir.) 41 F.2d 676;

New York Credit Men's Association v. Manufacturers Discount Corporation (2 Cir.) 147 F.2d 885, 887,

and cases *supra.* The control, which Max T. Edwards testified he had of the cash register, was control on behalf of Edwards, Ltd., as *its* agent, not on his own behalf or on behalf of the bankrupt corporation. Such control is not the kind of possession or control that con-

stitutes "property of" the bankrupt corporation. It is rather the property of Edwards, Ltd., the Canadian corporation. This distinction is pointed out in Restatement, Torts, Sec. 216, defining what is meant by possession of a chattel. Assuming at best that Max T. Edwards had physical custody of the cash register, the possession and control of the cash register was, nevertheless, in Edwards, Ltd., the owner. See *State v. Canyon Lumber Corp.,* 46 Wn.2d 701, 710, 284 P.2d 316, 322; *Henley v. State,* 59 Ga. 595, 2 S.E.2d 139.

In the *Canyon Lumber Corporation* case, the court said:

> " * * * it is the theory of the law that all property is in the possession of its owner, either in person or by agent. *Windsor v. McVeigh,* 93 U.S. 274, 23 L.ed. 914; *Portland & Seattle Railway Co. v. Ladd,* 47 Wash. 88, 91 P. 573."

The testimony of the Edwards, in light of the record, does not destroy the fact that legal possession and control of the cash register was in the Canadian corporation and the testimony does not create a jury question. In an analogous case, *Elenkrieg v. Siebrecht,* 238 N.Y. 254, 144 N.E. 519, one Siebrecht, his wife and daughter owned all the stock of a corporation and were officers in charge. In some letters he referred to the corporation's property as his property, and in referring to a possible reduction in rent, he referred to it in terms of "we shall be obliged to reduce his rent." An employee who was injured brought suit against Siebrecht, and the plaintiff relied in part upon the manner in which Siebrecht referred to the property as his. In holding that such testimony was not sufficient to make a jury question on the issue of Siebrecht's personal liability,

and in ordering the case dismissed, the court said at p. 521:

> "Merely because Siebrecht referred to the property as his property cannot overcome the undisputed fact of the corporation's existence and ownership. * * * However this may be, the corporation exists; it has title to the property; it maintains and operates the property through agents. The fact that it is a family corporation, so to speak, is nothing suspicious or illegal. Innumerable are the corporations wherein all the stock is owned by a few members of one family. The fact that one man may own all but a few shares of the stock, and be in fact the dominant and controlling factor or the only active manager of the corporation, is no evidence in and of itself that the corporation does not exist as a person in the eyes of the law actually owning, operating, and controlling property."

Had the government pursued the question as to whether what Max T. Edwards or Gilbert Edwards meant was individual control by Max T. Edwards as distinguished from control by Edwards, Ltd., the Canadian corporation, the matter would have been brought out in its true light and it would have been apparent that legal possession and control was not in either Max T. Edwards or Gilbert Edwards. Without such control being proved, there was a fatal defect in the government's case and no concealment was proved (See Br. p. 40, *infra*).

a. ***The facts and law as to control as applied to Max T. Edwards.***

As pointed out above, the possession or control to which Max T. Edwards testified was a possession or

control on behalf of the owner, Edwards, Ltd. There was no evidence below that the entity of Edwards, Ltd., should be disregarded. The government's own questions assumed that Edwards, Ltd., and Edwards Shaver Departments, Incorporated, were independent entities, each with its own creditors (R. 756, 765-766). The court's instructions assumed the independent character of the entities (R. 804). No instructions were given on the subject of disregarding the entity of the private corporation.[5] Max T. Edwards, having neither the required possession nor the required control of the cash register at the time the Trustee was appointed (and, indeed, there being no evidence as to when the Trustee was appointed and qualified), the evidence was fatally deficient in failing to prove that he had the cash register as "property belonging to the estate" of the bankrupt corporation.

b. ***The facts and law as to control as applied to Gilbert Edwards.***

The evidence showed that Gilbert Edwards had neither possession, control, nor physical custody of the cash register since prior to the appointment of the State Court Receiver. He was neither stockholder, officer or employee of the Canadian corporations, and was not a stockholder in Edwards Shaver Departments, Incorporated. His testimony that the cash register was available (R. 533) must also be understood in context of the record. For Gilbert Edwards to have gotten the cash register back, he would have had to ask Edwards, Ltd.,

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[5] The distinction as to the kind of control involved, above discussed, was wholly ignored in the court's instructions (R. 807), a deficiency which undoubtedly constituted a fatal and prejudicial factor in bringing about a verdict of guilty on the counts involved (see Br. p. 72, *infra*).

for it and Edwards, Ltd., had the absolute power to refuse on the ground that it had paid for the cash register and that the cash register belonged to it. See *Sheehan v. Hunter* (8 Cir.) 133 F.2d 303. The claim of Edwards, Ltd., could not be ignored, for example, so as to permit the exercise of summary jurisdiction by the bankruptcy court to require possession to be restored. See *New York Credit Men's Association v. Manufacturers Discount Corp.* (2 Cir.) 147 F.2d 885. Likewise as to Gilbert Edwards there was no evidence as to when the Trustee was appointed and qualified. Thus the government's evidence as to possession and control by Gilbert Edwards was especially deficient. Any possession or control there was, was in Edwards, Ltd., a Canadian corporation.

3. *The facts with respect to Count XXI involving the portable adding machine.*

With respect to the portable adding machine, the uncontradicted evidence is that Gilbert Edwards in February, 1953, delivered the adding machine to Max T. Edwards, president of Edwards Shaver Departments, Inc., so that he might use it as part of his equipment "with a portable typewriter and a camera, dictating machine and other things which I used in my travels" (R. 533, 630-631, 760). There was no receivership or bankruptcy considered or threatened by anyone at the time. The delivery to Max T. Edwards (R. 758) was simply part of the closing operations of the Seattle store (R. 762-763) and Gilbert Edwards never had legal possession, custody or control of the adding machine thereafter (Br. p. 17, *supra*). The government's evidence did not negative this innocent delivery

by Gilbert Edwards and the defendants' evidence established what transpired. If anyone had custody, control or possession, it was either Max T. Edwards as an individual or his Canadian corporation. Neither Max T. Edwards or his Canadian corporation were charged with concealing the portable adding machine from anyone.

4. ***It is well settled that there can be no concealment of assets belonging to the bankrupt unless the person charged with the concealment has possession or, at the very minimum, actual control of his own over the funds or the property involved when the Trustee is appointed.***

The government failed to prove such possession or control here. Indeed, the government failed to prove when the Trustee was appointed and qualified.

Reiner v. U. S. (9 Cir.) 92 F.2d 823;
Hersh v. U. S. (9 Cir.) 68 F.2d 799;
U. S. v. Camp (D.Haw.) 140 F.Supp. 98;
U. S. v. Schireson (3 Cir.) 116 F.2d 881.

In *Reiner v. U. S., supra,* in holding that there was no concealment from the trustee in bankruptcy because the government had failed to prove possession of the cash involved when the trustee was appointed, the court first reviewed the *Hersh* case, *supra,* at page 824 as follows:

> "In *Hersh v. U. S.* (9 Cir.) 68 F.(2d) 799, 804, the defendant was indicted for concealing assets from the trustee in bankruptcy. The court said: 'The burden of proof was upon the government to show the concealment of the funds alleged in the indictment. In view of the fact that the concealment relied upon consisted in the transfer of

moneys to Klein and Auerbach several months before the trustee qualified, it was essential to show that this concealment continued down to the time the trustee was appointed and thereafter, with intent to deprive the trustee and the creditors of the aforementioned sum.' "

The court continued at p. 825 as follows:

"The government contends * * * the evidence shows that concealment occurred after the appointment of Lynch as trustee, on July 7, 1936. There is no merit in this contention. It rests upon the assumption that, because the defendant did not, in June, turn over to the receiver all the cash he had obtained in Los Angeles on April 22d, before his departure for Denver, therefore he must have had some left on July 7th, and therefore that amount was concealed on or after July 7th.

"On this the burden of proof was on the appellee. Of the $2,670 cash appellant had on April 22d, he paid out, before he left Los Angeles, to attorneys and salesmen $540. Arriving in Denver, he spent $195 in rent, for accommodations in that city. The total thus accounted for amounts to $735. This leaves $1,935. In June, E. A. Lynch went to Denver and took from defendant all his textile stock and the sum of $1,210.34 in cash. This left $725 in cash unaccounted for. There is no evidence that this was not expended in necessary living expenses between April 24th and July 7th. The appellee failed to maintain its burden of proof that there was any of it left to conceal on July 7th."

Accordingly, if the bankrupt corporation, through its officers, had expended corporate funds or transferred corporate property in payment of its business expenses prior to the appointment of the Trustee, it

would be presumed that the sums paid out and property transferred were paid out properly.

Hersh v. U. S. (9 Cir.) 68 F.2d 799.

There was some evidence that on November 21, 1952, Edwards, Ltd., contracted to purchase an old boat, with a down-payment of $500.00 or $1,000.00 (R. 626), which was then put in repair and which Edwards, Ltd., used in its business (R. 626, 536). It was contended that there was some connection between the withdrawal of funds involved and the contract of Edwards, Ltd., to purchase this boat. No such contention was ever proved. Assuming *arguendo* that it had been proved, the rule applies that even if the moneys spent and property transferred had been used to pay the personal expenses of the officers or even if the moneys spent or property transferred had been given away or transferred to hinder, delay or defraud creditors, such conduct would not constitute the "concealment" charged, the funds and property not being on hand when the Trustee was appointed.

U. S. v. Camp (D.Haw.) 140 F.Supp. 98;
In re Hammerstein (2 Cir.) 189 Fed. 37.

In the case at bar, the government's own evidence, both through the books of account and the accountant, Ester, showed that the money described in the various counts of the indictment were withdrawn by Max T. Edwards in repayment of advances made by him to the corporation and by him, in turn, expended principally in repayment of bank loans, which were the source of the funds that he used to advance interest-free to the corporation (Br. p. 7, *supra*). Certainly, the payment of corporate indebtedness or the sale of corporate

assets, such as the cash register for value (See Br. p. 17, *supra*), are both presumptively proper and are not concealment. *Hersh v. U. S.* (9 Cir.) 68 F.2d 799.

5. *The so-called presumption of continued possession is insufficient to prevent judgment of acquittal.*

a. *Money counts*

The government may contend that proof of the withdrawal of funds in December, 1952, and January, 1953 (the dates charged in the counts involved), raises the presumption that the money was taken by Max T. Edwards and was still in his possession on May 7, 1953, when the involuntary petition was filed (R. 169). The difficulty with this position is that the government's own evidence showed that the corporation was indebted to Max T. Edwards and that this so-called withdrawal was charged to his account in repayment of his advances (See Br. p. 8, *supra*). Thus, with this explanation in the government's own case, the "presumption" of continuance of possession or the inference of continuance of possession could not be drawn. *Maggio v. Zeitz,* 333 U.S. 56, 92 L.ed. 476, 68 S.Ct. 401, 405-407. This is especially true in the absence of evidence as to when the Trustee was appointed.

Furthermore, the defendants' evidence showed the same thing, Max T. Edwards accounting for the withdrawals, as was done, for example, in *Reiner v. U. S.* (9 Cir.) 92 F.2d 823.

b. *The cash register*

What has heretofore been said as to the funds largely applies to the transfer of the cash register. The government's evidence that the cash register had been

transferred to Edwards, Ltd., was not accompanied by any direct evidence that the transfer was improper or in bad faith or without consideration. Indeed, the government's own evidence showed the plan to close down and discontinue the Seattle store operations because of their profitless character (R. 318). This was disclosed to the creditors at the meeting of February 27, 1953 (R. 324). The government not only failed to show that this transfer was not in aid of this program of closing down the Seattle store operations or other legitimate reason, but failed to show that the transfer was not for value. The defendants' evidence showed that the transfer was in aid of the closing down operations and was for value (Br. p. 16, *supra*), a transfer entirely consistent with innocence.

In determining whether the evidence was sufficient to show continued possession or control on the date that the Trustee was appointed, or even on the date the involuntary petition was filed, May 7, 1953, the inference of continued possession amounts to little more than suspicion or scintilla evidence and does not exclude other hypotheses of innocence which the defendants' evidence established in fact and *which the court may properly consider. U. S. v. Gasomiser* (D. Del.) 7 F.R.D. 712 (Br. p. 28, *supra*). Under the principle that the District Court must enter a judgment of acquittal if the jury must find from the circumstantial evidence that the transfer was not concealed, a judgment of acquittal should have been entered here on the counts involved.

Karn v. U. S. (9 Cir.) 158 F.2d 568;
U. S. v. Gardner (7 Cir.) 171 F.2d 753.

c. *The adding machine*

So far as the portable adding machine is concerned, the government's evidence showed that the adding machine was in a Seattle store managed by Gilbert Edwards and that Gilbert Edwards had taken the adding machine home to use it (R. 422) and that it was not on hand when the State Court Receiver was appointed (R. 127). The government apparently contends that the "presumption" is that the adding machine was still in Gilbert Edwards' possession on May 7, 1953, when the involuntary petition was filed (R. 441). This presumption or inference does not necessarily follow. Thus, the government failed to show that the portable adding machine had not been delivered, for example, to another agent or officer of the corporation for his use in company business and thus was no longer in the possession or control of Gilbert Edwards. Indeed, the defendants' own evidence proved that very hypotheses of innocence, namely, that Gilbert Edwards had delivered the portable adding machine (inadvertently referred to as cash register) to Max T. Edwards, the president of the corporation, who used it in company business along with the typewriter and other items which he carried with him in his travels (R. 533, 758). In the face of the government's own evidence that the Seattle store was to be closed (R. 318-319) and that the cash register and other items, including the adding machine, were sent elsewhere, any inference of continued possession would, at best, be a matter of suspicion and conjecture rather than justifiable inference (*Maggio v. Zeitz,* 333 U.S. 56, 92 L.ed. 476, 68 S.Ct. 401, 405-407), not inconsistent with innocence (*Karn v. U. S.* (9 Cir.) 158 F.2d 568,

and certainly not proof beyond a reasonable doubt.

In re Taylor (N.D. Ala.) 188 Fed. 479, 484:

> " * * * fraudulent concealment of assets * * * by the bankrupt must be made out by clear and convincing proof and is not the subject of mere suspicion or inference."

6. *Judgment of acquittal should be ordered.*

The government's evidence of continued possession or control on May 7, 1953, or thereafter, instead of meeting the standard of proof beyond a reasonable doubt, is at best nothing more than scintilla evidence, suspicion or conjecture accompanied by a failure to exclude other hypotheses consistent with innocence—hypotheses established, in fact, by the defendants' evidence. Judgment of acquittal should have been and should now be ordered.

Karn v. U. S. (9 Cir.) 158 F.2d 568;
U. S. v. Gardner (7 Cir.) 171 F.2d 753.

D. There was also no knowing or fraudulent concealment *in fact.*

1. *The facts as to disclosure*

The concealment, if any, must be "knowing and fraudulent." It cannot be inadvertent or unintentional or in good faith or in the honest belief that what he is doing is right. See *Jones v. Gertz* (10 Cir.) 121 F.2d 782, pp. 783, 784, and cases *infra*. Furthermore, if it be assumed, contrary to what has been heretofore said, that possession or control in the defendants and each of them was shown or if it be claimed that concealment consists in the fraudulent withholding of knowledge of property belonging to the estate of the bankrupt

corporation, nevertheless the evidence is still not sufficient, as a matter of law, to establish the crime charged because the government did not otherwise prove beyond a reasonable doubt that the concealment in the sense of withholding of knowledge was "knowing and fraudulent."

The government did not prove and the evidence did not otherwise establish that the Trustee and creditors were ignorant of the facts concerning the funds or property which were the subject of the counts involved. Neither the Trustee (who did not testify at all) nor the creditors testified to any such ignorance. The books of the bankrupt corporation disclosed the facts (R. 302) relative to the payment of the sums which are the subject of the money counts (See Br. p. 13, *supra*).[6] Mr. Ester, the accountant for the corporation, who was employed by both the Receiver and the Trus-

[6] The bookkeeping records between the Washington and Canadian corporations had always been kept in Vancouver, both in good times and bad (R. 280-281), Mr. Ester making adjusting entries on the books of the Washington corporation at the end of the year (R. 282). This practice did not show intent to conceal financial condition. *In Re Servel* (D.C. Idaho) 30 F.2d 102. During the British Columbia litigation, instituted on behalf of the Trustee (R. 619), Max T. Edwards made available the records showing the state of accounts between the Washington and Canadian corporations (R. 536, 613, 619) and which the plaintiff's attorney had in his possession for some time (R. 619). After the suit was settled, the records were returned (R. 526) and put in the Canadian store's basement. In some cleanup operations, some records were thrown out as being of no further use (R. 526). This was before the Indictment was served (R. 16-17). The financial statement of the Lewis Cutlery, Ltd. (R. 527-528) dated January 31, 1953, shows a contra account with the Washington corporation (R. 528) (see Br. p. 13, *supra*). The records involved have nothing to do with the money counts and have only to do with the cash register count, evidence of the transfer of which, however, could have been and was independently established by documentary evidence below (see Br. p. 16, *supra*). Certainly, the loss of the contra account records would not be evidence of concealment with respect to the counts charged, or otherwise. See *In Re Hirsh* (D.C. W.D. Tenn.) 96 Fed. 468, 476, 477.

tee, was available to the creditors at their meetings of February 27 (R. 322) and March 9 (R. 328) and to the Receiver (R. 301) and to the Trustee. There was no evidence that either defendant refused to reveal or answer questions. Gilbert Edwards not only cooperated with the Receiver (R. 374) but was examined by the Referee in Bankruptcy and testified to the affairs and property of the corporation (R. 732). Gilbert Edwards advised them as to what happened to those fixtures and equipment and disposition of funds (R. 732). This is disclosure—not concealment, hiding or secreting. *Dilworth v. Boothe* (5 Cir.) 69 F.2d 621, 623. Max T. Edwards was available, although the Trustee did not communicate with him by mail or otherwise. There was no evidence of any false statement, false affidavit or false bankruptcy schedule. There was no evidence that either defendant was aware or made aware of any information that was requested of him concerning any of the items which are the subject of the counts involved other than those matters as to which they were questioned and there was no evidence that questions put were not truthfully and fully answered. There was no evidence of any demand by Receiver or Trustee or any refusal to surrender (R. 605). *There is no evidence that anyone told either defendant that he had a particular duty to perform which he refused to perform or that either defendant violated any duty of which he had knowledge* (See Br. p. 54, *infra*).

2. *The Government failed to prove that the Trustee or creditors were ignorant of the facts.*

Before there can be a knowing and fraudulent con-

cealment, the Government must prove that the Trustee or creditors were ignorant of the facts. There can be no concealment of a matter as to which the adversely affected party has knowledge. Certainly, where the transfer is disclosed to the creditors there can be no concealment.

Hersh v. U. S. (9 Cir.) 68 F.2d 799;
Barron v. U. S. (1 Cir.) 5 F.2d 799, p. 804;
In re Hennebry (N.D. Iowa) 207 Fed. 882 (Disclosure before Referee).

Furthermore, proof of concealment requires something more than the mere failure to volunteer information to creditors, especially when creditors must be held to have had knowledge both as to the existence and whereabouts of an item claimed to be concealed.

In re Napco Mfg. Co., Inc. (D.Neb.) 72 F. Supp. 555.

Thus far, the argument has been predicated upon the knowledge of the creditors and of the Receiver prior to the filing of the involuntary petition on May 7, 1953. There is no evidence that the Trustee, after the date on which he was appointed and qualified, *as to which date there was no evidence,* did not have knowledge of all the facts. In fact, not only did the Trustee not testify, but the evidence on behalf of the defendants shows that there was a disclosure of the facts (Br. p. 12, *supra*).

Before the crime of concealment may be committed, the concealment must take place during the whole course of the bankruptcy proceedings. No such evidence appears here. See: *Johnson v. U. S.* (1 Cir.) 163 Fed. 30.

In re Morrow (N.D. Cal.) 97 Fed. 574;
In re Hirsch (W.D. Tenn.) 96 Fed. 468;

Gretsch v. U. S. (3 Cir.) 231 Fed. 57;
In re Hennebry (N.D. Iowa) 207 Fed. 882;
Johnson v. U. S. (1 Cir.) 163 Fed. 30.

In fact, the government disclaimed any intention to make such proof as to facts later than May 7, 1953, except as to one item, the nature of which is not clear (R. 167). Even if it be assumed, however, that disclosure must be made within a reasonable time after the Trustee is appointed, even that principle does not aid the government. At no time did the government prove either that the possession of the funds or the property was ever restored to the defendants, or either of them, following the appointment of a Trustee, or that information concerning such property was withheld from the creditors or the Trustee either knowingly or fraudulently (See Br. p. 54, *infra*).

3. *Mere negligent nondisclosure or even a preference is not fraudulent concealment.*

Assuming at the very worst that there was a careless or negligent nondisclosure of any of the items which are the subject of the counts involved, that is not the equivalent of a knowing and fraudulent concealment.

In re Morrow (N.D. Cal.) 97 Fed. 574.

Furthermore, the most that can be claimed resulting from the payment to Max T. Edwards or the transfer to Edwards, Ltd., is that a preference was effected as the result of the subsequent appointment of a Receiver or Trustee. However, it is settled that a mere preference is not fraudulent and is not the subject of unlawful concealment.

U. S. v. Alper (2 Cir.) 156 F.2d 222;

Levinson v. U. S. (6 Cir.) 47 F.2d 451 (Use of furniture to pay debts constitutes preference but not concealment).

E. As to Count XIX involving the transfer of a cash register, the evidence was also insufficient to show a transfer "in contemplation of a bankruptcy proceeding."

1. *The evidence which was wholly circumstantial is consistent with innocence and the jury could not properly* have found otherwise.

a. *As to both defendants*

Count XIX, unlike the remaining counts here involved, charged a fraudulent transfer as distinguished from a fraudulent concealment of a cash register. The transfer was presumptively innocent and in good faith. *Chodkowski v. U. S.* (7 Cir.) 194 Fed. 858. Not only was there a failure to show possession or the concealment of this cash register, as hereinabove set forth, but there was no direct evidence that the transfer was in contemplation of bankruptcy. Such evidence as there was was purely circumstantial. There was no evidence of discussion, consideration or contemplation in fact of bankruptcy at the time of the transfer [Attorney Sharp testified that he wasn't even consulted by either of the Edwards relative to bankruptcy prior to May 7, 1953 (R. 668)]. It is true there was evidence of financial difficulty and inability to pay and the fact that such inability had grown greater; but, at the same time, the evidence was that the company had always been undercapitalized, had always been in financial difficulty because so undercapitalized and had always been dependent upon credit and loans (See *In re Servel* (D.

Idaho) 30 F.2d 102, also Br. p. 5, *supra*). There was no evidence that prior to February 27, 1953, when an attachment was issued against the assets of the California corporation, anyone threatened bankruptcy (R. 668, 679) or that creditors were not cooperative. There was no evidence that bankruptcy was expected in the near future or at all when the transfer was made of the cash register. That the transfer was made for reasons entirely consistent with innocence appears from the uncontradicted evidence that the transfer was merely part of the program of closing down the Seattle store (the concessions which were profitable were to continue) because of the store's unprofitable character and the uncontradicted evidence that a continuance in the conducting of the business, as well as expansion, was sought, planned for and actually carried on (See Br. p. 5, *supra*). Why else would Max Edwards have continued to loan money to the corporation if he contemplated its bankruptcy, loans being made by him as late as February 13, 1953 (R. 772)? The evidence did not show any cause and effect relationship between the transfer of the cash register and the subsequent bankruptcy proceedings.

b. ***As to Max T. Edwards***

The Government sought to show contemplation of bankruptcy (possibly under the other counts for which defendants were found not guilty) by offering in evidence plaintiff's Ex. 40, being a letter dated May 15, 1953, and Exs. 41, 42, 43, 44, 45 and 46. This was correspondence subsequent to the filing of the involuntary petition in which Max T. Edwards sought to make a

virtue out of necessity. He was explaining to a creditor that "it was necessary to let the whole corporation go by the board in order to abrogate the old contracts with the department stores, but more especially in order to kill the lease on the Seattle store." However, this explanation was after an involuntary petition in bankruptcy, *not* a *voluntary* petition, and was clearly consistent with an attempt to salvage something from the wreckage. If the letter had been written prior to bankruptcy, especially if it had been written prior to February 20, 1953, a different question would have existed; but having been written subsequent to May 7, 1953, especially in light of the other circumstances, it is difficult to understand how such correspondence could evidence a transfer of a cash register in contemplation of bankruptcy which was not otherwise in fact contemplated or shown to have been contemplated. At worst, there may have been a contemplation of insolvency or operation by creditors or an operation by a state court receiver. That, however, is not "contemplation" of bankruptcy as that term is understood in the decisions. The phrase "contemplation of bankruptcy" undoubtedly means that bankruptcy *must be the impelling cause of the transfer* (R. 803-804) (See *Conrad, Rubin & Lesser v. Pender,* 289 U.S. 472, 77 L.Ed. 1327, 53 S.Ct. 703, 705). Consequently, contemplation merely of a state of insolvency is not enough (R. 804). *In re Hirsch* (W.D. Tenn.) 96 Fed. 468, 477; *In re Carmichael* (N.D. Iowa) 96 Fed. 594, 596; *Jones v. Howland, et al.,* 49 Mass. (8 Metc.) 377.

The courts point out in the above cases that one may contemplate insolvency without contemplating bank-

ruptcy. The contemplation of insolvency, not of bankruptcy, is the most that it can be fairly contended was established in this case.

c. ***As to Gilbert Edwards***

Furthermore, there was no showing that Gilbert Edwards had any knowledge of or had anything to do with the above correspondence. There was an entire absence of evidence that he contemplated the bankruptcy of the corporation involved.

F. ***As to Count XIX, the evidence was also insufficient to show a transfer "with intent to defeat the bankruptcy law."***

1. ***There was no proof that either defendant had any knowledge of the bankruptcy law or of any duty imposed upon them by law claimed to be violated.***

This "intent" implies a knowledge of the content of the bankruptcy law or a knowledge of a duty imposed thereby. The doctrine that ignorance of the law is no defense to crime does not apply where willfulness is an element of crime. Ignorance of a duty imposed by law negatives willfulness in failure to perform that duty.

Yarborough v. U. S. (4 Cir.) 230 F.2d 56, p. 61;
Hargrove v. U. S. (5 Cir.) 67 F.2d 820;
U. S. v. Murdock, 290 U.S. 389, 395, 396, 78 L.ed. 381, 54 S.Ct. 223.

In this case there is no evidence that either defendant knew the content of the bankruptcy law, or any provision thereof or of a duty imposed thereby (R. 615). Max T. Edwards was a Canadian subject. Furthermore, as to neither defendant was there any showing that either had consulted their attorney or attorneys

concerning possible bankruptcy. The evidence, indeed, affirmatively showed that they had not (R. 668). There was no showing that either defendant knew that in transferring the cash register, they were violating any duty imposed by law. Intent was thereby negatived.

Babb v. U. S. (5 Cir.) 252 F.2d 702, 708;
U. S. v. One Buick, etc. (N.D. Ind.) 34 F.2d 318, 320.

2. *Such proof as there was, was wholly circumstantial, consistent with innocence, and the jury could not properly have found otherwise.*

There is no evidence that there was any discussion or consideration or thought given to the transfer of the cash register on or about February 20, 1953, as having any bearing upon any possible bankruptcy because there was no bankruptcy then involved or in contemplation. There was, therefore, no evidence of any intent to defeat the bankruptcy law. The only evidence is that the transfer was made as part of the plan to close down the Seattle store. This was before there was any litigation; before there was any receiver; before there was any bankruptcy. It will be remembered that what we have here is involuntary bankruptcy, not voluntary bankruptcy. Had the bankruptcy been voluntary, it might be argued that it was contemplated or that it was intended to violate duties imposed by the bankruptcy law. That is not the case here.

G. As to Count XIX, the evidence was insufficient and judgment of acquittal should have been and should now be ordered.

Summarizing appellants' position as to Count XIX, the evidence was insufficient in that there was neither

possession nor control in the defendants or either of them of the cash register on and after the appointment of the Trustee, such possession and control having gone out of the bankrupt corporation to Edwards, Ltd., on or about February 20, 1953, the latter corporation being charged with the purchase price thereof; there was no concealment in fact by the knowing or fraudulent withholding of information concerning the cash register, and there was no showing that the Trustee or the creditors were ignorant of the transfer or the circumstances thereof; there was no showing that the bankruptcy was contemplated at the time of the transfer or that bankruptcy was the impelling cause of the transfer or even a factor motivating the transfer so as to justify the claim that the transfer was made in contemplation of bankruptcy; at best if there was a contemplation of anything other than the contemplation of the closing of the unprofitable Seattle store, it was a contemplation of nothing more than continued operation of the profitable concessions even under a slow-pay basis as formerly, or a contemplation of a possible operation under the supervision of creditors, or at the very most a possible state court receiver; finally there was no showing that the transfer was made with intent to defeat the bankruptcy law, there being no evidence that either defendant had knowledge of the content of the bankruptcy law or any provision thereof or of a duty imposed thereby claimed to be violated by the defendants.

There was a transfer, it is true, but under circumstances that were entirely innocent and entirely consistent with innocence. The elements of "knowing and fraudulent" and "in contemplation of bankruptcy"

and "with intent to defeat the bankruptcy law," not having been proved, judgment of acquittal should have been ordered on Count XIX and should now be ordered.

Karn v. U. S. (9 Cir.) 158 F.2d 568;
U. S. v. Gardner (7 Cir.) 171 F.2d 753.

H. As to Max T. Edwards, the evidence was also insufficient to prove venue.

Each of the counts charged Max T. Edwards with having violated the statute involved in Seattle, Washington. There is no evidence that any affirmative act of concealment, that is secreting or even withholding of information, took place in Seattle, Washington. True, the money to repay his advances was paid to Max T. Edwards or delivered to Edwards, Ltd., by Edwards Shaver Departments, Incorporated, apparently by checks mailed from Seattle. True also, the cash register was shipped from Seattle to Vancouver to Edwards, Ltd., by the Bekins Transfer Company. But the mailing of these checks and the shipping of the cash register did not constitute the crime of concealment. There could be no fraudulent concealment until the Trustee was appointed some time later. If we assumed that the Trustee was appointed on May 7, 1953, there is no evidence that Max T. Edwards, either by affirmative act or by inaction, did anything in Seattle, Washington, thereafter with reference to the items complained of. Thus there is no evidence that he withheld any information from the Trustee in Seattle, Washington, or made any false statement or false claim in Seattle, Washington. There is no evidence that Max T. Edwards himself took possession of the cash register in Seattle,

Washington. Edwards, Ltd., took possession of the cash register in Vancouver, British Columbia. If therefore there were a fraudulent concealment, such concealment took place in Vancouver, B. C., and not in Seattle. Under these circumstances, there was a failure of proof of an essential element, namely venue.

Venue must be proved as an essential element of the offense charged. *Rachmil v. U. S.* (9 Cir.) 43 F.2d 878. A motion for acquittal raises the question as to whether venue has been proved.

U. S. v. Browne (7 Cir.) 225 F.2d 751, 755;
U. S. v. Jones (7 Cir.) 174 F.2d 746, 748.

It is submitted that the defendant Max T. Edwards' motion for judgment of acquittal should also have been granted for failure to prove venue—an essential element of the offenses charged.

I. Insufficiency of all the counts involved as to Max T. Edwards—Summary

The government's evidence was insufficient as to the concealment of money counts, namely Counts III, VI, IX, XII, XV and XVIII, and as to the cash register concealment Count XX:

1. Because the government failed to prove possession or control of the items involved on and after the appointment of the Trustee. The money had been used in December, 1952, and January, 1953, to repay Max T. Edwards for his advances so that he in turn could and did repay bank loans incurred by him to raise funds with which to advance to the corporation, to pay life insurance premiums, and to assist his wife in a small way with an investment of hers. As to the cash

register, legal possession and control had passed to Edwards, Ltd., about February 20, 1953. Any control of Max T. Edwards thereafter was on behalf of Edwards, Ltd., a separate corporation with a life and creditors of its own. The cash register was therefore not property belonging to the estate of the bankrupt and could not therefore be the subject of concealment on or after the appointment of the Trustee. The government failed to prove when the Trustee was appointed and qualified.

2. Because the government failed to prove that there was a knowing or fraudulent withholding of information concerning the items involved. The government failed to prove in that connection that the creditors or the Trustee were ignorant of the facts. Assuming at best that Max T. Edwards negligently failed to disclose or received an unlawful preference created because of the subsequent appointment of a receiver or Trustee within four months after the payment of his advances, such conduct does not constitute the offense of concealment.

3. As to Count XIX, the claimed fraudulent transfer of the cash register count, in addition to deficiencies in the government's evidence summarized in subparagraphs 1 and 2 above, the government failed to prove that the transfer was "in contemplation of a bankruptcy proceeding." The government's evidence did not negative either the possibility or probability that the transfer was for a proper purpose such as a transfer for value in connection with closing down the unprofitable Seattle store operations. The likelihood of this proper purpose was confirmed by defendants' evidence as to what transpired in fact. The government therefore

did not establish that the impelling cause of the transfer or even a substantial reason for the transfer was "in contemplation of a bankruptcy proceeding." At best, if any contemplation was established, it was either a contemplation of closing the unprofitable Seattle store but continuing with the profitable concession business of the various department stores, or in contemplation of insolvency or continued insolvency or in contemplation of operation by creditors, or at the very most the contemplation of the appointment of a state court receiver. These are not equivalent to a contemplation of a bankruptcy proceeding.

4. Again as to Count XIX, the government's evidence did not establish that the transfer was "with intent to defeat the bankruptcy law" because it failed to show that the defendants either knew the content of the bankruptcy law or any provision thereof or of a duty imposed thereby. Without such knowledge, the necessary intent could not be established. The transfer for value in connection with the closing down operations of the Seattle store shows the transfer to have been consistent with innocence on this phase of the matter, that is, that the transfer was with no intent to defeat the bankrupcy law but rather to carry out a proper and innocent purpose.

5. The government's evidence failed to establish that the concealment of the funds or property complained of took place in Seattle, Washington, as charged by the counts of the indictment. Assuming that there was a concealment, it took place in Vancouver, British Columbia.

For each of the foregoing reasons, the evidence was

insufficient as to each of the counts involved, and the motion for acquittal should have been granted and should now be ordered.

J. Insufficiency of all the counts involved as to Gilbert Edwards—Summary

1. The evidence was insufficient as to Gilbert Edwards with respect to both the money counts and the cash register counts for the reasons 1, 2, 3, and 4 summarized in subparagraph I dealing with the insufficiency of the evidence as to Max T. Edwards. An additional circumstance applicable to Gilbert Edwards is that, unlike Max T. Edwards, he owned no stock in the bankrupt corporations so as to benefit from any of the transactions complained of. The likelihood of his innocence is therefore increased, and the burden of the government in applying the rule that circumstantial evidence must be inconsistent with innocence is correspondingly increased.

2. As to Count XXI charging concealment of a portable adding machine solely by Gilbert Edwards, the government's evidence was insufficient. (a) There was no evidence that Gilbert Edwards had either possession or control of the portable adding machine at the time of the appointment of the Trustee or thereafter and the government failed to negative the possibility or probability that such possession and control had properly passed from Gilbert Edwards to say another officer of the corporation such as Max T. Edwards. This possibility and probability was actually proved in the defendants' case. (b) There was no evidence that the creditors or Trustee were not fully aware of the facts

concerning the delivery of the adding machine so that there was neither a knowing or fraudulent withholding of information. Defendants' evidence established affirmatively that there had been a disclosure as to what happened to the fixtures and equipment and disposition of funds (R. 732-733). The government failed to prove that the conduct of Gilbert Edwards with respect to the portable adding machine was not inconsistent with innocence so as to constitute the crime of fraudulent concealment. Judgment of acquittal should have been ordered below and should now be ordered (See Br. p. 39, *supra*).

Specification of Error No. 4

II.

The District Court Prejudicially Erred in Submitting to the Jury Counts of the Indictment on Which the Evidence Was Not Sufficient, Assuming *Arguendo* that the Evidence Was Sufficient as to Other Count or Counts of the Indictment. Accordingly, the Judgment Should Be Reversed and a New Trial Ordered.

A. The defendants were prejudiced thereby warranting a new trial.

It may be assumed *arguendo* that the court may reverse as to some counts and affirm as to others where the evidence is clearly segregated and compartmentalized, so that one can say that particular evidence is applicable to a particular count. If, however, there is submitted to the jury counts as to which the evidence is insufficient to permit a verdict of guilty, such submission may prejudicially affect the defendants as to other counts as to which it may be assumed *arguendo* the evidence is sufficient. The prejudicial error involved here is of several kinds.

1. Evidence which would not be admissible in the absence of the particular count is admitted with prejudicial consequences to the defendants as to other counts.

2. The assumption by the jury that there is evidence sufficient to convict the defendants of the crime charged when the assumption is unwarranted because of the insufficiency of the evidence.

3. The inadmissible evidence and the unwarranted assumption of the sufficiency of the evidence may and do prejudice the jury in the consideration of other counts of the indictment as to which the evidence may be prima facie sufficient but as to which the jury if unprejudiced by these inadmissible items might draw conclusions of innocence.

These items of prejudice are all the more detrimental in a case of this kind involving 21 counts. The same circumstantial evidence was used as background material for all the counts (See Br. p. 2, *supra*). In some instances evidence was offered as to particular counts or as to a particular defendant (R. 129-130, 131, 136, 244, 246). Later when the court instructed the jury, the instructions were long and abstract. It is impossible for any jury, including the jury here involved, to remember what evidence was offered as to what counts and as to what defendant and how to apply oral instructions of a lengthy and abstract nature to the particular facts of this case as to 21 counts. This is all the more true since the oral instructions do not go into the jury room for study and consideration. What has heretofore been said is made even worse by the erroneous admission of certain evidence and the erroneous exclusion of certain evidence (Spec. Err. 5, 6, 7, 8, 9).

When therefore the jury found the defendants guilty on a number of counts as to which the evidence was really insufficient (see Br. p. 30, *supra*), it is difficult to resist the conclusion that the jury were adversely affected in their consideration of other counts assuming *arguendo* that the evidence was sufficient as to these. The jury might well have used evidence applicable to a count as to which the evidence was insufficient and inferences and conclusions based thereon to convict the defendants as to counts on which there was at least a close question as to whether guilt existed or as to which the evidence may have been insufficient.

One cannot safely say that had the defendants been tried on one, two or three counts only, uninfluenced by the mass of evidence which would then have been inadmissible, or as to which the evidence was insufficient, that the result would have been the same (See also Spec. Err. 10) (Br. p. 72, *infra*).

If the error as to one count (whether in the admission of evidence or because the insufficiency of the evidence precludes submission thereof to the jury) prejudicially affects the count on which the jury has found a defendant guilty, a new trial should be granted.

U. S. v. Perlstein (3 Cir.) 120 F.2d 276, 283;
U. S. v. Koch (2 Cir.) 113 F.2d 982;
U. S. v. Groves (2 Cir.) 122 F.2d 87, 91;
People v. Adler, 73 N.Y. Supp. 841.

Furthermore, unless it affirmatively appears that the error was insubstantial and therefore not prejudicial, a new trial should be granted (See Br. p. 29, *supra,* and p. 72, *infra*).

III.

The District Court Prejudicially Erred in Overruling Objections Interposed on Behalf of the Appellants and Each of Them to Evidence Adduced on Behalf of the Government.

A. Specification of Error No. 5; in admitting Plaintiff's Ex. 24 (R. 353)

Plaintiff's Ex. 24 is a letter from Edwards Shaver Departments, Incorporated, to Mr. Cosby, Receiver, signed by Max T. Edwards, the letter being dated March 27, 1953, demanding the return of general ledgers of "my California corporation (Edwards Shaver Departments, Inc.) along with all money, inventory sheets, check registers, general paper and mail." The letter requests the delivery of these items to his attorneys, attention: Seth W. Morrison.

The evidence showed that Mr. Cosby was receiver only of the Washington corporation and not of the California corporation. It was, therefore, in the judgment of the corporations and Max T. Edwards' attorney, improper for Mr. Cosby to hold possession of the California corporation papers. Obviously acting under the attorney's advice (his own evidence confirmed this) (R. 586), Max T. Edwards demanded that Mr. Cosby surrender up papers improperly in his possession. This could have no possible bearing upon the counts of the indictment either as to Max T. Edwards or certainly as to Gilbert Edwards, who was not shown to have had anything to do with the matter. Its only effect was to prejudice the defendants as if there was something improper about the demand. Yet, any lawyer would have advised Mr. Edwards to do exactly what he did do

without dreaming that taking such advice would in anywise be evidence of anything improper.

See *In re Topper* (3 Cir.) 229 F.2d 691, holding that the advice of counsel may be an excuse for an inaccurate or false oath so as not to preclude a discharge in bankruptcy. The admission of Ex. 24 was especially prejudicial here as indicating to the jury an effort to suppress evidence (even by Gilbert Edwards). See *McWhorter v. U. S.* (6 Cir.) 281 Fed. 119.

B. Specification of Error No. 6; in admitting Plaintiff's Ex. 12 (R. 149)

Plaintiff's Exhibit 12 is a check dated February 12, 1953, by Edwards Shaver Departments, Incorporated, signed by Max T. Edwards, payable to Gilbert Edwards in the sum of $2,000. The government's own evidence showed that Gilbert Edwards had lent Edwards Shaver Departments, Incorporated, $1800 August 5, 1952 (R. 308, 347, 348), which sum was owing on the date in question. The withdrawal represented a repayment without interest plus a small advance prior even to the meeting with creditors of February 27, 1953. The innocent character of this transaction is evidenced by the fact that as early as January, 1952, consideration had been given to expansion of the business by the incorporation of two companies which were, in fact, incorporated under legal advice (R. 482-483, 603, 655, 656) of two reputable attorneys about February 9, 1953 (Pl. Exs. 25 and 26). Gilbert Edwards was the owner of record pending a determination (which was never made) as to which of the Edwards brothers should become stockholders and in what amount (R.

674). In order to provide these corporations with funds, Gilbert Edwards was paid $2,000, so that he received $200 more than he had lent the corporation if we ignore the interest to which he would normally be entitled on any loan to the corporation. No count charged that there was anything improper about this $2,000 payment to Gilbert Edwards. Counts XIII, XIV and XV involve a sum of $2,000, but not the $2,000 with which we are presently concerned. Just how this evidence could have any bearing upon any of the counts involved, it is difficult to see. The transaction was an entirely innocent one and nothing improper was shown about it. Gilbert Edwards, at the time of the payment of the $2,000, was still working for the Washington corporation; still receiving a salary of $350 a month, plus expenses, and an advance of $200 at best over his interest-free loan of $1800 could easily have been charged against his salary and expense account so that the corporation was fully protected at all times. Just because Gilbert Edwards received $2,000 (fully disclosed on records) at a time when he was owed $1800 under the circumstances above, could not possibly have any bearing upon concealment involved in the money counts. Those moneys had been paid out sometime prior to the $2,000 payment to Gilbert Edwards in repayment of Max Edwards' advances. Nor could it have any bearing upon the transfer of the cash register as having been fraudulently made because that transfer, as has been pointed out above, was made as part of the closing operations of the Seattle store and for which Edwards, Ltd., was charged. It would have no bearing upon the concealment of the adding machine because it had no connec-

tion therewith and no rational inference could be drawn from the $2,000 payment that could constitute proof of such concealment. Yet, to offer this evidence, especially in connection with other evidence showing a purchase by Shaveraids, Inc., of receivership assets at a sale (R. 371-372) as though there were something improper about that, too, could only have a prejudicial effect by the use of irrelevant and immaterial evidence. This is one of a series of items, the cumulative effect of which apparently proved prejudicial.

If the Government contends that Ex. 12 was admissible on a count as to which the defendants were held not guilty, nevertheless, this inadmissible evidence was prejudicial as to the counts on which the defendants were found guilty, and a new trial should be ordered.

This is all the more true in this case because the Government on occasion would offer its evidence as to a particular count or as to a particular defendant, but on other occasions would offer its evidence generally (R. 129-30, 131, 136, 244, 246).

C. Specification of Error No. 7; in permitting the government's witness, Benjamin Kendall Cosby, State Court Receiver, to testify concerning the sale of assets of Edwards Shaver Departments, Incorporated (the bankrupt corporation) to Shaveraids, Inc., owned by Gilbert Edwards (R. 361).

It is difficult to understand how evidence that Shaveraids, Inc., purchased assets of the State Court Receiver at sale could have any possible bearing upon the counts of the indictment. How could it possibly prove concealment of the funds paid out the previous December and January? How could it possibly have any

bearing upon the sale of the cash register to the Canadian corporation? How could it possibly have any bearing upon the claimed concealment of the adding machine? It was merely a step in the course of the receivership. The testimony had the effect of making it appear that there was something improper about the sale and from which the jury could infer something improper about the action with respect to the other counts of the indictment. The testimony was especially immaterial as well as prejudicial since it was the position of the Government that the defendants had not been guilty of any concealment from the Receiver (R. 169).

D. Specification of Error No. 8; in permitting Government witnesses to testify concerning the amount received by general creditors percentagewise from either the State Court Receiver or the Federal Court Trustee in Bankruptcy or both (R. 249-251, 99-100).

Since it was independently established that the assets were insufficient to pay creditors at the time of the filing of the petition for bankruptcy, it is difficult to understand how evidence of the percentage received by general creditors from the state court receiver or the Trustee in bankruptcy could properly be evidence of "the intent of the defendants in making the transfer alleged" (R. 99). The amount paid by the receiver and Trustee is determined by expenses of administration as well as assets available and neither of the appellants had any control over the amount of such expenses or over the percentage payable to general creditors. The amount received has nothing to do with "intent." The

only purpose served by this testimony of the percentage paid was to prejudice the jury by a matter not material or relevant to the issues. This evidence only served to enhance the prejudice created by the admission of other improperly received evidence in light of inadequate instructions from the court (See Br. p. 73, *infra*).

Specification of Error No. 9

IV.

The District Court Prejudicially Erred in Sustaining the Government's Objection to Admission of Defendants' Ex. A-22 (R. 501).

Defendants' Ex. A-22 (Brief, Appendix B) is a written accounting of the sums of money described in the counts of the indictment showing where the money came from and what happened to the money. The trial court refused to permit the introduction of Ex. A-22 in evidence in the absence of a stipulation permitting its introduction, because the court believed he had no discretion in the matter of its introduction.

The rule, however, is that such an exhibit may be admitted in the discretion of the court. Exhibits summarizing testimony have been admitted in criminal cases.

Eggleton v. U. S. (6 Cir.) 227 F.2d 493;

Keller v. President, et al., 41 Del. 471, 24 A.2d 539.

See also:

32 C.J.S. 592;

22 C.J. 896.

The court was, therefore, in error in excluding the exhibit and refusing to exercise the discretion which he had to permit its introduction.

It might be contended that since the evidence of which Ex. A-22 is a summary had already been testified to orally, no prejudice resulted from the refusal to permit the written summary to be placed in evidence. The prejudice, however, is obvious. No jury could possibly keep in mind the details of the accounting. Unless the jury had before it in the jury room a written summary of the accounting evidence, the jury was compelled to speculate on what the evidence was. The evidence was highly material because it had a direct bearing on the counts of the indictment concerned with the accounting testimony. With the accounting testimony before them in comprehensible form, as set out in Ex. A-22, the jury might well have recalled the intricate accounting evidence and concluded that the Trustee in Bankruptcy had adequate notice of the withdrawals and the reasons therefor and could not possibly have contended successfully that the information had been concealed from him. We cannot know what the jury relied on in coming to the conclusion that concealment had taken place. We know from elsewhere in this brief that the evidence was insufficient as a matter of law on which to predicate a charge of concealment. The jury, having found the defendants guilty on money concealment counts, might well have been influenced by that fact on the transfer Count XIX or the concealment Counts XX and XXI dealing with the adding machine and cash register. Had the court exercised the discretion it had, to admit the exhibit, the result of the case might have been different. The refusal to exercise such discretion, in the mistaken notion that no such discretion existed, is, therefore, prejudicial error.

If there is any question about the prejudicial effect of the non-admission of this exhibit, or of the erroneous admission of evidence (Spec. Err. 5, 6, 7, 8) the rule announced in *U. S. v. Andolschek* (2 Cir.) 142 F.2d 503, 506, should be remembered:

> "We cannot, of course, know, as the record stands, how prejudicial the exclusion may have been, but that uncertainty alone requires a new trial; for it does not affirmatively appear that the error was insubstantial within the meaning of 28 U.S.C.A. §391."

See also Br. p. 29, *supra.*

Specification of Error No. 10

V.

The District Court prejudicially erred in denying appellants' respective motions for new trial filed March 19, 1958, pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure, such denial constituting an abuse of discretion.

We are aware of the rule that a motion for new trial in the interest of justice (Rule 33) is granted or denied in the discretion of the District Court, and the exercise of such discretion is ordinarily not reviewable.

Balestreri v. U. S. (9 Cir.) 224 F.2d 915, 916.

However, there is language suggesting that the ruling of the District Court is reviewable if there is abuse of discretion.

Steiner v. U. S. (9 Cir.) 229 F.2d 745, 749.

Not wishing, by not complaining of the action of the District Court in denying the motion for new trial, to infer acquiescence—and bearing in mind the possibility that review is appropriate where there has been an

abuse of discretion—the action of the District Court has, therefore, been assigned as error (See also Spec. Err. 4, Br. p. 62, *supra*).

It will be borne in mind that evidence concerning the essential elements of the crimes charged, namely, "knowing and fraudulent," "contemplation of bankruptcy," and "intent to defeat the bankruptcy law" was purely circumstantial. It will be remembered that there are in this case demonstrable hypotheses of innocense wholly inconsistent with guilt. It will be remembered that the jury had to consider twenty-one counts in an involved case and had to remember what evidence was applicable to all counts, what evidence was offered as to one defendant and not against the other, and what evidence was applicable only to particular counts. It will be remembered that particular instructions given by the court were quite abstract and voluminous and it will be remembered that the jury does not take such instructions for study and application in the jury room. The omission of pertinent instructions on the entire record becomes all the more serious, especially in the case where the evidence as to guilt is extremely close. Here, the jury was inadequately instructed on the significance and nature of control and possession in relation to the counts on which the defendants were convicted charging concealment (R. 807) (Br. p. 38, *supra*). Furthermore, the jury was not instructed at all upon the significance of the so-called presumption or inference of continued possession on which the government relied below in taking the case to the jury (R. 441). Still further, there was an entire absence of in-

structions on the significance of the advice of legal counsel as bearing upon the question as to whether any action taken was taken in good faith, as distinguished from being taken knowingly and fraudulently. It will be recalled that the evidence showed that Mr. Alexander Charles Sharp, a British Columbia attorney, and Mr. Gerald DeGarmo, a Seattle attorney, the legal advisers of the corporations involved, were actually in attendance during the discussions and meetings with creditors. Mr. Sharp testified to his participation in the activities of the corporation and of the defendants. Since the issue of good faith was a vital issue in the case, had the jury been instructed that following the advice of an attorney and acting with his knowledge and approval negatives or may negative claimed knowing and fraudulent conduct, the result might well have been different. Still even further, there was no instruction that ignorance of a duty imposed by law negatived intent to violate the law. The instructions given were inadequate (R. 806, 807, 808) (Br. p. 54, *supra*). [They also erroneously assumed the Trustee was appointed May 7, 1953 (R. 807)]. While it is true that the defendants did not request the instructions nor take exception to the failure of the court to instruct on these four points, neverthless, the failure of the jury to have those legal principles reviewed and called to the jury's attention may well, in view of their importance, have constituted a substantial factor in the jury's verdict of guilty.

Assuming that the failure to instruct the jury on these important matters is not independently assignable as error (See, however, *Tatum v. U. S.* (C.A.D.C.)

190 F.2d 612; *Stephenson v. U. S.* (9 Cir.) 211 F.2d 702, 705),[7] nevertheless, they are considerations which should properly be taken into account on a motion for new trial to prevent the miscarriage of justice. A jury should understand the case. *U. S. v. Di Matteo* (3 Cir.) 169 F.2d 798.

The errors complained of invite a careful evaluation of the matters occurring at trial, the necessity for which evaluation is spurred by the severity of the sentences imposed on each defendant. Although it is recognized that the severity of sentences has been held not reviewable here (*Kachnic v. U. S.* (9 Cir.) 53 F.2d 312, 315; *Allred v. U. S.* (9 Cir.) 146 F.2d 193) and for that reason is not assigned as error, and, although the District Court, under F.R.C.P. 35, may reduce the sentences imposed in the event of affirmance of judgment, nevertheless, at this stage, the severity of the sentences may well alert the Court, in the interests of justice, to make certain that error was not committed. It is difficult to understand how, under the evidence in this case showing the repayment of admitted advances to Max T. Edwards (Br. p. 6, *supra*), any three-year sentence could possibly be justified. It is even more difficult to understand how, with respect to Gilbert Edwards, who benefited not at all from these repayments, any sentence of two years could be justified. Furthermore, with respect to the used cash register, valued at $126, or with the portable adding machine, the value of which is not in the record (had the value been suffi-

[7] We do not waive the benefit of the Rule 52 (F.R.C.P.) permitting plain errors or defects affecting substantial rights to be noticed although they were not brought to the attention of the court.

ciently substantial, the government would undoubtedly have proved it), it is difficult to understand how a three-year and two-year sentence could be justified.

CONCLUSION

It is respectfully submitted that judgment should be reversed as to each defendant and as to each count involved with directions to enter judgment of acquittal, or alternatively to order a new trial.

Respectfully submitted,

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APPENDIX A

EXHIBITS	*Identified*	*Offered and Received*	*Offered and Rejected*
Pl. Ex. 1	101	779	
2	107	736	
3	108	115	
4	110	.....	
5	120	120	
6	128	128	
7	137	.....	
8	138	139	
9	140	140	
10	141	142	
11	143	145	
12	145	149	
13	150	150	
14	151	151	
15	156	.....	
16	156	.....	
17	175	179	
18	180	191	
19	201	.....	
20	204	204	
21	206	208	
22	210	213	
23	210	214	
24	345	353	
25	358	382	
26	359	383	
27	376	379	
28	384	387	
29	388	390	
30	390	391	
31	391	391	

EXHIBITS	*Identified*	*Offered and Received*	*Offered and Rejected*
32	392	394	
33	394	394	
34	395	395	
35	396	398	
36	397	398	
37	397	412	
38	404	405	
39	414	414	
40	561	561	
41	567	573	
42	568	573	
43	569	573	
44	569	573	
45	570	573	
46	572	573	
47	590	645	
48	641	643	
49	698	.....	
50	753	755	
Deft. Ex. A-1	217	644	
A-2	269	271	
A-3	271	271	
A-4	296	297	
A-5	313	315	
A-6	313	315	
A-7	314	315	
A-8	314	315	
A-9	431	432	
A-10	454	455	
A-11	454	456	
A-12	460	460	
A-13	464	466	
A-14	464	465	
A-15	473	474	

EXHIBITS	*Identified*	*Offered and Received*	*Offered and Rejected*
A-16	477	477	
A-17	488	488	
A-18	490	491	
A-19	490	491	
A-20	494	495	
A-21	494	495	
A-22	496	.....	501
A-23	504	644	
A-24	505	644	
A-25	511	513	
A-26	514	515	
A-27	518	519	
A-28	527	644	
A-29	616	617	
A-30	622	622	
A-31	627	629	
A-32	627	630	
A-33	627	632	
A-34	720	721	

APPENDIX B

Cause 49562
Defendant Exhibit A-
Rejected

MAX T. EDWARDS

Schedule of Disbursements of Principal Funds Transferred fr
Seattle, Washington, December, 1952-January, 1953

*Initials

1952

12/15/52 P.B.-M.E. $4,000.00 — 9320 Prev. Bal. $267.50
9320 $3,875.00
12/19 $ 500.00 Cash
12/20 2,000.00 G.A. and to Martin Lt
12/22 1,000.00 Mfg. Life Ins. Co.

12/30 P.B.-Ed. Ltd. $15,000.00
12/31 Ed. Ltd. to 9320 $16,000.00
12/31 9320 $16,021.92 Imp. Bank

12/30 P.B.-Ed. Ltd. $5,000.00
12/31 Ed. Ltd. $5,000.00 Imp. Bank

12/30 P.B.-M.E. (9320) $7,500.00
12/31 M.E.-B.E. $2,144.54 end. to and depo
ited Ed. Ltd.
12/31 M.E.-Ed. Ltd. $ 874.63 and deposited
12/31 M.E.-P.E. $ 430.44 end. and deposit
Ed. Ltd.

Deposit $4,000.00 from Ed. Ltd.
1/2 M.E.-Martin Ltd. $8,000.00
1/5 M.E.-Martin Ltd. 687.94

1953

1/12 P.B.- 9320 Prior balance 21
2,021
1/5 M.E.-Martin Ltd. $1,000.00
1/5 M.E.-B.E. 1,000.00

1/22 P.B.-B.E. 1/22/53 $3,000.00 to Imp. Bank

*Denotations
P.E. = Peoples National Bank of Washington
Imp. Bank = Imperial Bank of Canada in Vancouver
M.E. = Max Edwards
B.E. = Bert Edwards
P.E. = Paul Edwards
Ed. Ltd. = Edwards Limited in Vancouver
9320 = joint account of Max and Goldie Edwards, his wife

(See Brief p. 70-72)

APPENDIX C

Excerpt from 18 U.S.C., Section 152

"§152. *Concealment of assets; false oaths and claims; bribery*

"Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

* * *

"Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or

* * *

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."